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INTERNATIONAL LAW

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Sadly the Editors have to record the death on 8 June 1979 of Daniel Patrick O'Connell, Chichele Professor of International Law in the University of Oxford and Fellow of All Souls College since 1972. An appreciation of Professor O'Connell's work for international law will appear in the next volume of this *Year Book*.

HERSCH LAUTERPACHT AND HIS ATTITUDE TO THE JUDICIAL FUNCTION*

By SIR GERALD FITZMAURICE¹

I

THE fiftieth volume of the *Year Book* may fittingly include a memento of, and tribute to, one of its greatest editors.

A few words, first, of a personal nature recalling Sir Hersch Lauterpacht's work on Human Rights, in the course of which he did so much to turn that subject from something of a largely ideological character—as an aspiration rather than a reality—into a juridical concept having practical possibilities. It is certain, however, that his preoccupation with it sprang from a different part of his total personality from that which made him—by any reckoning—one of the most eminent jurists of our time, and without a peer in the international field. Some of this preoccupation must have derived from his origins in Austrian Poland in the years before World War I. But it was not only that,—it was his basic nature;—and although it is with certain aspects of his work as a jurist—and more particularly of his attitude to the judicial function—that this article is concerned, it must always be borne in mind that law was far from being the only thing in his intellectual outlook that counted. In the present writer's Chambers in the Temple there is a small photograph cut out of some periodical many years ago and framed. It depicts a statue in the Temple gardens—a statue which is still there today—of a small boy looking out over the wide green lawns towards the old Inner Temple Hall, destroyed during the war but since replaced;—and the caption underneath it—a line of Charles Lamb's—reads 'Lawyers were children once'. When looking at that Hersch Lauterpacht often comes to mind,—for, in the best sense of the notion, he never ceased to be like a child—his spirit of enquiry (or as it has most felicitously been put, his 'never-ceasing restlessness of the mind'²), and the freshness of his outlook were always remarkable. All those who knew him will remember that gaze of speculative wonderment he used sometimes to assume—making one ask oneself whether one had not perhaps just said something rather especially foolish which he was being too kind to remark upon! But no!—it merely meant he had thought of a new and intriguing idea which he was about to give voice to.

*© Sir G. Fitzmaurice, 1980. Adapted from a lecture delivered at Cambridge in March 1979, in the series of the 'Hersch Lauterpacht Memorial Lectures'.

¹ Judge of the European Court of Human Rights; formerly a Judge of the International Court of Justice.

² *Per* Ambassador Shabtai Rosenne in the *American Journal of International Law*, 55 (1961), at p. 829,—to whom, as to the late Dr. Wilfred Jenks, in his analogous article in this *Year Book* for 1960, the present article owes much.

II

In his judicial work, however, Lauterpacht, as he will henceforth be referred to, was far from being a child or even adopting a childlike attitude, and he never swerved in the least from what was in his view right and just. But no one was ever a fairer controversialist or more ready to appreciate points of view other than his own, even where he disapproved of them.

His situation was indeed an exceptionally interesting one—for it must always be a question how far anyone whose experience, achievement and habit of mind have lain, or found expression, exclusively in the academic field is going to be able, in his sixties, to manifest, or develop, those qualities that make a good judge;—for there is a great difference between writing about a thing and reaching a definite decision upon it. In the one case it is possible to be contented with speculation, with historical material, with describing and giving the arguments in favour of different points of view, with expressing a preference for one or other of these but without reaching a definite conclusion,—and so forth. A judge sitting in a concrete dispute cannot do this—or he cannot content himself with it. He has to give a decision, and he has to give it not merely with reference to what the correct legal position might be, considered in the abstract, but with reference to it as applied to the facts and circumstances of the particular litigation. This may not be at all an easy task for someone without any previous experience of it—whose experience has indeed been at best only tangential to the process of arriving at definite decisions in concrete cases.

In most European countries—probably in most other countries outside the common-law system—the judiciary is a career in itself which people enter at a comparatively early age. They are qualified as lawyers but do not necessarily have any experience as practitioners, and may never acquire any. But, although for this reason they will, over a considerable period, deal only with small or unimportant cases, or act as assistants to more senior colleagues, the end result is that by the time they come to do more serious work on their own responsibility they have acquired a fund of judicial knowledge and experience to guide them. In England and under most common-law regimes, where judges are appointed from the Bar, or at least from the ranks of practitioners, the new judge, although he may never previously have sat as such, has spent his previous twenty-five to thirty years or so in close contact with the process and procedure of the courts, and has watched the whole technique of judging and decision-making at close quarters. For him, then, the transition from arguing a case as advocate before a judge, to judging a case that advocates have argued before him, is not a particularly difficult one to make.

For an international lawyer such as Lauterpacht on the other hand, with his almost exclusively academic background and no previous experience of practice beyond occasionally giving his advice in the form of written opinions, the transition from Professor to international judge cannot have been as easy one,—yet all the evidence, the evidence of his judgments and separate opinions at The Hague, shows that he took it in his stride. He was in fact the first United King-

dom judge to have found himself quite so situated. In point of time, the earliest British judge, in the days of the present Court's predecessor, the former Permanent Court of International Justice, Lord Finlay, was of course eminent both as a practitioner and judge, and as an ex-Attorney-General and ex-Lord Chancellor, before he ever went to The Hague. His successor, in 1929, Sir Cecil Hurst, in his previous capacity as Legal Adviser to the Foreign Office, had had an immense and wide-ranging experience of concrete cases and situations in the international field, on which it had been his function to advise H.M. Government;—and he had originally also had the experience of some years of practice at the Bar. Equally Lord McNair, who succeeded Hurst in 1946 in what had by then become the International Court of Justice, and who was Lauterpacht's immediate predecessor, had not had an exclusively academic past, or even one confined to the field of international law—a subject to which he only began to devote himself full-time towards the middle 1920s when he was around forty. When the present writer had the privilege of being one of his pupils in the years 1921–4 the subject he mainly taught was English Contract Law. McNair in fact started his professional life, before the First World War, as a solicitor in London, changing over after some years to the Bar. His transformation into an international lawyer with a highly distinguished academic career in that field was gradual. Moreover, from quite an early stage he was in demand as a member, and later Chairman, of various Government and other public boards and commissions, service on which—if it is to be good—requires certain judicial qualities of mind. It would not perhaps be going far wrong to say that by nature McNair was always more of a judge than an advocate.

But to return to Lauterpacht,—he did not, on the threshold of his judicial term at The Hague—all too woefully short—enjoy any of the advantages, in entering upon his new functions, that his distinguished predecessors had done,—except (and it is of course an important exception) that he did gain considerable 'field' experience (by which is meant experience beyond the confines of his own library and lecture hall) through his membership of the International Law Commission of the United Nations during the years that preceded his election to the International Court. Nevertheless, to codify—even to make law—(although it may afford insights)—is not to apply it *in concreto*; and election to the Court must have involved something of a leap in the dark for one whose previous activity had consisted in an almost ceaseless out-pouring of his thoughts and views on every branch, and every aspect, of international law, and who was now to be translated to a sphere where all such activities outside the actual judicial work involved—even if not necessarily, or always, inconsistent with the Statute of the Court—must henceforth be drastically reduced both in scope and manner of expression,—rather like a busy industrialist suddenly called upon to take the monastic vow. For an original and creative thinker and writer, like Lauterpacht, donning the judicial robe must have proved a severe restriction, since a judge can only deal with the legal issues and circumstances involved in the particular dispute before him: he cannot invent a dispute that is not there, nor can he range freely over wide pastures that are not material to the case, or

theorize beyond a certain limited extent,—and even so he must try to exercise a considerable measure of restraint, both as to what he says and as to how he says it.

III

In negotiating these and kindred difficulties Lauterpacht was helped by various factors that were themselves the products of his own virtues. First, he had the support of his innate good taste and instinctive sense of propriety. Indeed it was this sense of propriety that led him on occasion to criticize the Court for what seemed to him a derogation from it. One type of example of this occurred in the *Voting Procedure* and *Hearings of Petitioners*¹ cases, both of them requests for advisory opinions about South West Africa. Lauterpacht was critical because, as he saw it, the Court was not addressing itself to the real questions that were in issue, or was dealing with them in a manner that tended to ignore the underlying reasons that had led to the request for the Court's opinion. Again, in the jurisdictional phase of the *Interhandel* case, he was strongly critical of the course adopted by the Court in dismissing Switzerland's application,—because this was done on one of the grounds of inadmissibility put forward by the defendant government (the United States), leaving open, however, and unanswered, objections to the Court's *jurisdiction* to entertain the case at all;—for, as Lauterpacht correctly maintained, a Court is not entitled to pronounce on the admissibility of the *claim* made in a case, unless it has jurisdiction in regard to that case. Otherwise it is not competent to consider questions even of the admissibility of the claim. Consequently, to decide that a claim is inadmissible is to imply that if it were not inadmissible the Court could and would proceed to deal with it,—in other words, would have jurisdiction to do so. But this was the very question that had been left undecided, although the Court's jurisdiction had been duly challenged by the respondent party.

Certainly Lauterpacht could be outspoken, as was shown by the very forthright language he used in the *Norwegian Loans* and *Interhandel*² cases about the propriety and legality of what had come to be known as 'automatic' reservations to a government's declaration in acceptance, or purported acceptance, of the Court's obligatory jurisdiction, according to which it was for that government itself (and not the Court) to decide whether, in a concrete case, the reservation was applicable or not;—and this, as Lauterpacht maintained, meant that there was no true acceptance of the jurisdiction at all, creative of obligation to resort to the Court, since the government concerned could always get out of that at will by a mere *ipse dixit*. There was merely, Lauterpacht contended, an inchoate *voluntas* to be confirmed or not in relation to each particular case *ad hoc*, at the discretion of the defendant government. Yet, strongly as he felt about this, Lauterpacht never departed from a strictly judicial attitude, himself suggesting and carefully considering every point that could be made against the view he sought to maintain, namely that this type of reservation, apart from being

¹ Respectively, *I.C.J. Reports*, 1955, p. 67; and 1956, p. 23.

² Respectively, *I.C.J. Reports*, 1957, p. 43 onwards; and 1959, p. 97 onwards.

unworthy and undesirable, was destructive of the validity and efficacy of the purported acceptance of the Court's compulsory jurisdiction to which it was attached,—that in effect it nullified it.¹

A second element that made the transition from professor to judge a smooth one for Lauterpacht was his encyclopaedic knowledge of international law, and of much related law besides. There may have been other judges of the International Court, past or present, on Lauterpacht's level of legal acumen, perspicacity, balance of mind and industry: there can seldom have been any that came to the Court with more all-round and detailed, or better, knowledge of the law. There is a lesson to be learnt here. Judges are of course presumed to know the law and to know it better than the learned Counsel who appear before them. But if realities count, it has to be confessed that in practice this is not always the case,—and more especially with a court such as the International Court, election to which may often turn on factors other than—or held to be of at least equal weight to—juridical merit pure and simple, and adequate previous experience in the international legal field as such. All, or most, standing tribunals in this field, that are electively composed—in contrast to *ad hoc* ones whose members are selected for a particular dispute by the parties to it—tend to have this characteristic, namely of being rather more dependent on the arguments and material submitted to them by counsel on either side than would otherwise be the case.

Again, even the most conscientious international judge tends to become relaxed in this respect and to rely on the Parties, in their own interests, bringing to the notice of the court every fact, every consideration, every argument—all the authorities and all the precedents—that could assist or be relevant to their respective cases,—so that there may be little real need for the individual judge to do any separate research on his own account. At least, this is what some judges may well be tempted to think,—that knowledge will come as matters progress, and that if the judge did not know much about the law of the case when it started, he will or should know a lot by the time he has arrived at, and has to formulate, his conclusions. Thus there may well come about a tendency to think (and there is certainly something in this) that what, in the last resort and within reasonable bounds, matters in a judge, is not so much knowledge and learning as such, but penetration and insight, the ability to distinguish between seeming likes, the corresponding ability to recognize what is common to seeming *unlikes*, to discern what is relevant and what not, and why,—and generally, the power accurately to reckon the true weight to be given to each element in the case and to arrive at a well-considered assessment.

Lauterpacht, of course, possessed the two sets of qualities in marked degree—the

¹ The virtual abandonment, or at least arrest, of this practice, following upon Lauterpacht's exposure of its implications, is in danger of being replaced by one equally destructive of the reality of any purported acceptance of the Court's obligatory jurisdiction,—namely that resorted to by certain States in recent years, of formal 'non-appearance' on the ground that the Court's lack of jurisdiction is so self-evident as to require no argument and need no contestation, even where a concrete jurisdictional clause exists and appears to constitute a possible basis of competence for the Court. It is hoped to enlarge elsewhere on the evils of this practice which Lauterpacht would have deplored.

knowledge and the learning—the insight and the faculty of evaluation. But the range and depth of the one—his by now engrained erudition,—must in large measure have freed his mind to concentrate on the other—namely the intensive thinking usually required in order to see the wood rather than only the trees in an international dispute. At the same time he never dispensed with, or neglected, the element of personal research in reaching his conclusions,—still less did he depend exclusively on the material placed before the Court by the Parties. His qualities as a former professor and writer stood him in excellent stead here. Some of his finest pieces of research are to be found in the separate opinions he delivered as a judge. There is not space now to go into these: one conspicuous example must suffice, to be found in his dissenting opinion in the preliminary objection phase of the *Interhandel* case¹ of which it has been said by a foremost expert on the jurisprudence of the International Court, that many will recognize it, particularly where it examines the roots of United States policy regarding international arbitration, ‘as a superb piece of research and stark in the conviction it carries’.²

‘Stark in the conviction it carries.’ This is perhaps the moment to make a brief reference to another of Lauterpacht’s assets as a judge—one that he definitely brought with him as a carry-over from his academic work—namely his extraordinary power of clear and trenchant exposition, never, however, pushed to exaggeration. He had the gift of putting a point, or argument, in a way that was not only devastatingly cogent, but virtually unanswerable. This may not have been very popular with the ‘opposition’, so to speak, but it added enormously to the effectiveness of his judgments and opinions. Many a piece of reasoning, good in substance, fails to come across because it is poorly expressed,—and if brilliance of expression cannot of itself cure substantive defects, it does greatly enhance impact and convincingness when (as with Lauterpacht) substance and expression go hand in hand. If possession is nine-tenths of the law, nine-tenths of an argument is how it is put.

IV

This leads on to the elements that are most prominent in Lauterpacht’s attitude to the judicial function, one of which had also been an outstanding and constant feature of his academic work and writings,—which, carried over into his new sphere, was one of the things that enabled him to enter upon his judicial duties as at least an adult in that sphere, and almost already a professional or expert. That feature was his lifelong belief in, and devotion to, the cause of the judicial settlement of international legal disputes (and he regarded almost all such disputes as having at any rate legal *aspects*, capable of such settlement). This had constituted the motive force of three of his major works on international law,—*Private Law Sources and Analogies of International Law*; *The Function of Law in the International Community*; and *The Development of International Law by the International Court*. All of these, at all events in their original

¹ *I.C.J. Reports*, 1959, p. 107 onwards.

² *Per Rosenne*, loc. cit. (above, p.1 n. 2), at p. 836.

editions, had appeared some twenty to thirty years before he went to The Hague.¹ (The title of the third of them—*The Development of International Law by the International Court*—reflects the double aspect that judicial settlement had in Lauterpacht's mind: States ought to refer their international law disputes to an international tribunal; and equally, it was part of the function of the tribunal, in settling the dispute, to develop the law.) The first two of these works, which may be called for short *Sources and Analogies* and *The Function of Law*, consisted in very large measure (although their titles may suggest something different) of a study and analysis of the leading international arbitral and judicial decisions of the 19th and 20th centuries that had been given up to the 1930s—so much so that, taken in combination, they almost amount to a short Digest of international law cases up to that time. Three main themes run through them, one of which, as mentioned above, forms also the main theme of the third work, which may for short be called *Development*. Of the other two themes, the first is that the distinction once sought to be drawn—(and very much to the fore in the 1920s and 1930s when Lauterpacht was writing)—between so-called 'justiciable' and 'non-justiciable' disputes was false or unreal. If an obligation to have recourse to a court of law or arbitration in specified circumstances had been entered into, Lauterpacht maintained that it could not validly be avoided in a given case on the plea that that particular case was rendered 'non-justiciable' because, for instance, it had prominent political aspects, or involved so-called 'vital interests'. He went further, and would not admit that a dispute could be regarded as 'non-justiciable' merely because international law was silent on the subject-matter of it, since he did not really admit that international law was—or at least need be—silent in regard to any dispute between States. Moreover, the plea was question-begging; for until a tribunal had gone into the matter, it could not be said for certain that international law was in fact 'silent' about it. This might be the very question that had to be decided,—and Lauterpacht had, in one succinct phrase on p. 369 of *The Function of Law*, dismissed the whole notion of non-justiciability when he wrote that it was not 'the nature of an individual dispute that [caused it to be] unfit for judicial settlement, but the unwillingness of a State to have it settled by the application of law', a remark which is, unfortunately, as true, or even truer, today than it was when Lauterpacht made it.

It follows that Lauterpacht was always an ardent advocate of the compulsory or obligatory jurisdiction of such a tribunal as the International Court; and as a judge he leaned, whenever it was reasonably possible to do so, in favour of the existence of jurisdiction for the Court, if this was disputed. But, as always with him, he did not carry this attitude too far, and in his judgments and opinions consistently recognized the principle that, whether directly or indirectly, it was the consent of States that was the foundation of international legal jurisdiction. The problem is to obtain, or be able legitimately to infer, that consent.

¹ They were originally published, respectively, by Longmans, Green, in 1927; the Oxford University (Clarendon) Press in 1933; and as five lectures delivered in the same year at the *Institut des Hautes Études Internationales*, Geneva, and republished in greatly expanded book form by Stevens & Sons in 1958.

As the late Wilfred Jenks so graphically put it, citing in support a passage from pp. 437–8 of *The Function of Law*, Lauterpacht recognized that the only solution for the perennial problem of confidence in recourse to law, lies in ‘regarding compulsory jurisdiction as an element, but only one element, in the development of an organised international community in which the risks of compulsory jurisdiction—which are real—are accepted as part of the price of the stable international order without which there can be neither peace nor justice’,¹—in just the same way that, on the internal national plane, the citizen has on occasion to bow to erroneous or even unfair decisions, as the price of having to submit to lawlessness or perhaps anarchy instead.

The next main component in Lauterpacht’s attitude to the judicial function was a necessary corollary of the first,—for if one maintains that all international disputes are justiciable, or at least have justiciable legal aspects, the determination of which can pave the way to a complete settlement,—and if it is contended (as Lauterpacht came close to doing) that all such disputes should be referred to international arbitration or adjudication, preferably according to some system of obligatory jurisdiction,—then it becomes impossible to tolerate a situation in which, the dispute having been duly so referred, the tribunal would have to declare itself powerless to give a decision because of the lack of any rule of international law applicable in the context, or because international law was ‘silent’ on the subject-matter of the dispute.

But be that as it may, Lauterpacht totally rejected, or regarded as illusory, the view, very prevalent then and still fairly current now, that international law is an incomplete—almost primitive—system, full of gaps and *lacunae*. He did not of course maintain that the law would always automatically come up with a ready-made answer to every problem. What he did maintain was that an international tribunal would always be able to find an answer consistent with the general spirit and principles of international law, through recourse to a variety of devices and techniques—in much the same way as, in the heyday of the English common law, the absence of written or otherwise well-defined rules never prevented the courts from finding and declaring the law. In short, he did not admit the possibility of what is technically called a *non-liquet*.²

Of course there is a purely formal sense in which a *non-liquet* can always, or at least in most cases, be avoided. If State X brings a claim, or makes a complaint, against State Y, and the tribunal considers there is no applicable law to go by, it can simply, on that ground (which is a quasi-legal one), reject the claim or complaint and find in favour of the defendant State Y, on the basis that if there is no applicable law on the subject, *a fortiori* can there be no legal responsibility attaching to State Y. To that extent therefore there will be no *non-liquet*: the tribunal will have given judgment—in favour of one party not the other—and

¹ Loc. cit. (above, p. 1 n. 2), pp. 26–7.

² *Non-liquet* (q, u, e, t) does not mean a *non-licet* (c, e, t)—it is forbidden or not allowed. *Non-liquet* from the verb *liqueo*, *liquere*—liquefy—means, it is not clear, it is not apparent and, this being so, the law cannot therefore be stated,—see the present writer’s contribution to the *Mélanges Rousseau* (A. Pedone, Paris, 1974), pp. 89–112 *passim*, but especially n. (3) on p. 90.

for a formally correct reason. But this is not at all what Lauterpacht had in mind when he denied that there need ever be a *non-liquet*. In the first place, the type of case just mentioned, though it may be the principal one as to which any question of *non-liquet* can arise, is not the only one. Many disputes that come before international tribunals do not involve a simple claim or complaint by the one party against the other. Particularly is this so with disputes submitted to the tribunal not by a unilateral application by one party, but by an agreed '*compromis*', and where the parties wish to avoid either of them being technically plaintiff or defendant or charged with the burden of proof. Again, the tribunal may be asked to declare 'which' of two rival views of the law or interpretations of a treaty clause is the correct one, or 'where' a certain boundary lies, or 'whether' certain requirements have been fulfilled,—and so forth.

But Lauterpacht meant a great deal more than that even, when he denied the necessity for any *non-liquet*, for any attitude of *non-possumus* on the part of an international tribunal. He meant that such a tribunal always could, or always should be able to come up with what would not merely be, in the formal and technical sense, a decision in the case, but a decision that would deal with the substantive issues of merits involved. If there appeared *prima facie* to be no relevant applicable law, or if there were seeming gaps or uncertainties, the tribunal must make good these deficiencies by other means. Lauterpacht's earliest major work, *Sources and Analogies* from private law, subtitled 'With Special Reference to International Arbitration', was specifically directed to this object, namely to show to what a remarkable extent apparent gaps in international law could be filled up by having recourse to rules and principles of private law in similar or analogous fields,—for instance land law, property, succession, prescriptive rights, servitudes, liability for negligence and damage, measure of damages, contracts, leases, evidence and procedure. All these and many other topics have their counterpart in public international law,—which is really quite natural if States are visualized as akin to a congeries of landed proprietors whose estates are in greater or lesser proximity one with another, and who also have many similar business interests.

In later works, and equally during his time as a judge, Lauterpacht found constant support for his rejection of any need for a *non-liquet* in the duty cast both on the former Permanent Court of International Justice and on the present International Court by Article 38 of their respective Statutes, to apply *inter alia* the 'general principles of law recognized by civilized nations' in reaching their decisions. This, in his view, should render it out of the question for the Court ever to conclude that there was no applicable rule or principle that it could have recourse to in a disputed case.

Lauterpacht returned constantly to this theme. After *Sources and Analogies*, he devoted over eighty pages of *The Function of Law* to it; a whole chapter of *The Development of International Law by the International Court* in the 1958 edition, after he had become a judge of the Court; and, also after he had gone to The Hague, in a self-contained article in *Symbolae Verzijl* entitled 'The Prohibition of *Non Liquet* and the Completeness of the Law'. It was of course in Article

38 of the Court's Statute, just mentioned, with its reference to the 'General Principles of Law' and the Court's duty to apply them, that Lauterpacht found warrant for his 'prohibition' of *non-liquet*; since, given the wording of Article 38, there could now be no room for any failure to find an applicable legal rule or principle. It is, however, still in *The Function of Law* (p. 105), written a quarter of a century earlier, that there appears the best summing-up of what was then still a rather revolutionary view,—and as the passage is typical of his style, it may be quoted *verbatim* here:

The history of international [sc. legal] arbitration is a continuous proof of the view that the alleged absence of legal rules does not in actual practice constitute an obstacle in the way of judicial settlement of international disputes. For three lessons emerge with convincing clearness from the practice of international arbitration in the last hundred and thirty years; the first is that in the majority of cases international tribunals have been confronted with novel situations for which international law had no ready-made solution at hand. The second is that there is, so far as the writer is aware, no dispute on record in which an international tribunal has refused to adjudicate on the ground that there was no law applicable to the case. The third is that this consistent fulfilment of the judicial duty to pronounce the law in each case has not been achieved at the cost of sacrificing the strictly legal character of international arbitration.

This last consideration means that international legal tribunals have never been reduced to acting as mere conciliation commissions.

V

A last feature—or the last that can be discussed here—in regard to Lauterpacht's attitude towards the judicial function was his insistence on the duty of an international judge, and of international courts in general, to develop the law as well as decide—(though in the course of deciding)—the concrete case in hand. As the present writer said in an article about Lauterpacht's judicial work which was written some sixteen years ago

There are broadly two main possible approaches to the task of a judge, whether in the international field or elsewhere. There is the approach which conceives it to be the primary, if not the sole, duty of the judge to decide the case in hand, with the minimum of verbiage necessary for the purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.¹

Lauterpacht was, of course, a convinced supporter of the second of these approaches, the foregoing description of which exactly reflects his attitude. In the international field, there are at least three main reasons for regarding it as the right one. *The first* emerges clearly from the passage quoted earlier, in which Lauterpacht said that in most cases international tribunals had in fact been called upon to deal with novel situations, for which international law had no

¹ *This Year Book*, 37 (1961), pp. 14–15.

ready-made solutions at hand. This is still true even though, on certain topics, precedents have mounted. Clearly, in such circumstances, habitual failure to find adequate law to fit the novel situation would have brought the international arbitral and judicial process to a standstill. *Secondly*, whereas on the internal plane courts of first instance are backed by a system of tribunals of appeal which can reverse or adjust their decisions and enlarge still further on the law, and there exists also a national legislature to revise the law and make new law, nothing that fully corresponds to this exists on the international plane. International tribunals (including the International Court) are courts of first instance, but there is no appeal from their decisions unless this is specially provided for, which it seldom is. Nor is there anything exactly corresponding to a legislature, although, through the codifying work of the International Law Commission and, as the follow-up of that work, the series of multilateral conventions of a quasi-law-making character that have been concluded over the last twenty years, there is now something akin to a legislative process in the international field. All the same, judicial precedent remains a most important agent of law-development and, as Lauterpacht believed—and he had made this clear in his writings long before he went to The Hague—it was part of the function of such a tribunal as the International Court to act as such an agent. It could not invent or create law,—but within reasonable bounds, it could and should find it in existing principles, and further it by clarifying and developing existing rules. *A third* reason for this, to which Lauterpacht attached weight, was the effect likely to be produced on States generally, on the parties to any given dispute in particular, and more especially on the losing party in that case. States and parties in the international field—entities which are proud, sensitive, and always to some extent at the mercy of their own domestic public opinion—disposed also to be distrustful of legal procedures—need to be given the feeling that their arguments have been adequately considered and above all, understood—so that they have something to show for the risks they have taken in going to law. This cannot be done unless it can be demonstrated that the tribunal is something more than a mere agent for providing a result, but is also discharging an *institutional* function which raises that result to a higher power, as part of a process of legal clarification or development. That at any rate, was, in effect, Lauterpacht's view;—and it goes without saying that he was equally a strong supporter of the faculty, of which he himself made impressive use, for a judge to give separate or dissenting opinions in a case if he did not agree with the conclusions of the majority or had different reasons for arriving at the same conclusions. True, if no separate or dissenting opinions were allowed (as is the case in some countries), or none beyond a mere declaration of dissent, the weight of the judgment might seem greater; but the exercise as a whole would be poorer, and the satisfaction to the losing party nil.

VI

To sum up,—Lauterpacht manifested, in his judicial as in his earlier work, a rare combination of an acute and almost infallible intelligence, with a liberal and generous heart and mind—qualities that can, not infrequently, seem as conflicting

as the hypothetical irresistible force meeting the immovable object. But in this respect Lauterpacht understood, as few others have done, how to render unto Caesar the things that are Caesar's and unto God the things that are God's. The following passage, written about him not long after his death, may also serve as his epitaph on the present occasion.

If the quality of mercy is not strained, neither can that of judicial eminence be subject to any finite analysis, although mercy is certainly one of its ingredients. In his judicial work, Lauterpacht exhibited the same broad sense of humanity as had characterized all his previous work and outlook. In the last analysis, no judge lacking in humanity can be great as a judge, no matter what the virtuosity and legal merits of his findings. Other qualities of the great judge, pre-eminently possessed by Lauterpacht, were courage (he frequently took a very unpopular line); insight; breadth of outlook; learning; grasp of principle and the capacity to apply it to the facts of the case in hand; the ability to temper law with justice, and yet at the same time to do justice within the discipline and confines of the law.¹

Addressing his spirit we may well say: *sis tamen nobiscum, Magister, ne culpaе nostrae obliui sumus.*

¹ Loc. cit. (above, p. 10 n. 1), at p. 7.

CAUSES OF ACTION IN THE LAW OF NATIONS*

By IAN BROWNLIE†

I. INTRODUCTORY

THE bundle of issues which may be described, on a somewhat provisional basis, as the 'causes of action' in the law of nations requires investigation.¹ In spite of the practical importance of the subject it has been consistently neglected in the literature.² The creation of the Permanent Court of International Justice and its successor and the accumulation of jurisprudence from various international tribunals have made little difference. As a sample the neglect of the subject may be seen from a perusal of the following works: Oppenheim, *International Law*, Volume I: Peace, first edition of 1905; the same, eighth edition by Hersch Lauterpacht of 1955; O'Connell, *International Law* (2 volumes), second edition of 1970; Guggenheim, *Traité de droit international public* (2 volumes), first edition of 1953; Sørensen (editor), *Manual of Public International Law*, 1968; and Whiteman, *Digest of International Law* (15 volumes), 1963-73.

Without accepting that the lack of examination of the causes of action is inevitable, some explanations may be offered. Much of international law is concerned with questions of legal competence: either of capacity (as of a type of legal person) or of territorial or jurisdictional competence. Consequently many statements tend to be in terms of *vires*, that is in terms of a public law determination of 'essential validity' or powers, and the emphasis is thus upon opposability rather than delict. A distinct consideration is that a major weakness of many general works lies in the inadequate treatment of the subject of State responsibility. In any case even the more authoritative discussions of the principles of State responsibility tend to be abstract and, in so far as they are relatively specific, to be concerned with the particular topic, or family of topics, known as 'the treatment of aliens'.

II. THE SIGNIFICANCE OF DEFINING THE CAUSE OF ACTION

The definition or formulation of the subject-matter of a dispute is called for in a number of specific contexts (considered below) which concern the conduct of cases before international tribunals; but the significance of defining the 'cause of action' or content of a dispute is by no means confined to the sphere of adjudication and extends generally to the law of claims and of diplomatic protection. Moreover, there are important links between the diplomatic and judicial phases of a dispute in the contexts of justiciability and admissibility of claims.

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¹ Certainly, there is no intention to suggest an analogy with the 'forms of action' as known to the Common Law prior to the Judicature Acts.

² The significance of the question is noticed by Jennings, *Recueil des cours*, 121 (1967-II), p. 507.

It is convenient to summarize the contexts in which the definition of the precise subject of a dispute is called for.

1. *Institution of proceedings before an international tribunal*

Article 40, paragraph 1, of the Statute of the International Court of Justice provides: 'Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.' The Rules of Court adopted on 14 April 1978 provide as follows in Article 38:¹

1. When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the state against which the claim is brought, and the subject of the dispute.

2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.

Apart from the formal significance of the contents of the Application, a State may create considerable obscurity and cause damage to its own case by a failure to make clear submissions on the question *qualis sit actio* either at all or at the stage of the final submissions to the Court. An example of the difficulties which ensue is provided by the French submissions in the *Norwegian Loans* case,² 'which should be remembered as a warning'.³

A question which remains to some extent open is whether the Court would reject an Application solely on the ground that on its face no question of international law was involved: that is to say, on the basis that the formal requirements of the Statute and the Rules of Court had not been satisfied. No doubt the Court would be reluctant to refuse to be seised of a case on such grounds.

2. *The nature of the dispute cannot be transformed by the Conclusions or Final Submissions of the Parties in the course of proceedings*

In the *Fisheries* case (*United Kingdom v. Norway*)⁴ the International Court analysed the 'Conclusions' presented by the Agent of the United Kingdom at the end of his oral reply. In particular the Court observed:⁵

Points 3 to 11⁶ appear to be a set of propositions which, in the form of definitions, principles or rules, purport to justify certain contentions and do not constitute a precise and direct statement of a claim. The subject of the dispute being quite concrete,

¹ See also Article 35 of the Rules of Court as amended on 10 May 1972.

² *I.C.J. Reports*, 1957, p. 9; and see Judge Read, dissenting opinion, at p. 82.

³ Mann, this *Year Book*, 46 (1972-3), pp. 504-5. See further the same author, *Recueil des cours*, 96 (1959-I), p. 7 at pp. 80-2; and *The Legal Aspect of Money* (3rd edn., 1971), pp. 493-5.

⁴ *I.C.J. Reports*, 1951, p. 116.

⁵ *Ibid.*, p. 126. See further Fitzmaurice, this *Year Book*, 34 (1958), pp. 152-5.

⁶ *Ibid.*, pp. 121-2.

the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government . . . that the Court should deliver a Judgment which for the moment would confine itself to adjudicating on the definitions, principles or rules stated, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government. . . . These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree.

3. *Objections to jurisdiction ratione temporis*

It can be indicated, briefly, that the precise identification of a dispute has an important bearing upon the application of a preliminary objection to the effect that a dispute had arisen prior to the acceptance of the compulsory jurisdiction of the Court by the respondent State. Where there are separate disputes, the validity of the objection will require consideration with respect to each dispute. Thus in the *Interhandel* case¹ the Court gave separate consideration to the first preliminary objection of the United States *ratione temporis* in respect of the 'principal claim' and the 'alternative claim' in the Application of the Swiss Government. The 'principal claim' concerned the restitution of the assets claimed by Interhandel in the United States; in the 'alternative claim' Switzerland asked the Court to adjudge and declare that the United States was under an obligation to submit the dispute to arbitration or conciliation.

4. *Objections invoking the reserved domain of domestic jurisdiction*

In the same way objections founded upon the reserved domain of domestic jurisdiction may require separate application to the distinct claims found in an Application. The *Interhandel* case² provides such an instance and in its judgment the Court applied the United States objection (fourth preliminary objection (b))³ separately to the two claims of the Swiss Government (see section 3 above).

5. *Prior exhaustion of local remedies*

In the *Interhandel* case the third preliminary objection invoked by the United States concerned the failure by Interhandel to exhaust the local remedies available to it in the United States courts. The Court upheld this objection and held the Swiss Application to be inadmissible. Once again the two claims set forth by Switzerland were accorded separate consideration.⁴ The 'alternative claim' presented by Switzerland was exclusively designed to raise issues concerning the interpretation and application of two international agreements, the Washington Accord of 1945 and the Treaty of Arbitration and Conciliation dated

¹ *I.C.J. Reports*, 1959, p. 6, at pp. 20-2. See also the *Right of Passage* case (*Merits*), *ibid.*, 1960, p. 6 at pp. 33-4.

² *I.C.J. Reports*, 1959, p. 6 at pp. 23-5.

³ The other aspect of the objection (in the 'peremptory' or 'automatic' form) was found to be 'without object at the present stage of the proceedings'.

⁴ *I.C.J. Reports*, 1959, pp. 26-9.

16 February 1931. The Court¹ was unable to distinguish this claim from the 'principal claim' (for restitution of Interhandel assets in the United States). The justification for this approach provided by the Court is by no means convincing and in a dissenting opinion Judge Lauterpacht expressed his disagreement with the reasoning.² It is to be noted that similar problems were adverted to by Judges Lauterpacht³ and Read⁴ in the *Norwegian Loans* case.

6. Res Judicata

It is obvious that the identity of the cause of action is an element in a determination that an issue is governed by the principle of *res judicata*.⁵

7. The issues of justiciability and judicial propriety

In a small number of cases the International Court has refused to pronounce on the merits on the ground that the question before it was 'moot'. In the *Northern Cameroons* case (*Preliminary Objections*)⁶ the Court placed emphasis on the fact that the Trusteeship had been irrevocably terminated by a resolution of the General Assembly of the United Nations. A particular issue was the relevance of the fact that the Applicant State did not seek reparation but a declaration 'that, in the application of the Trusteeship Agreement for the Territory of the Cameroons under British Administration . . ., the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations directly or indirectly flowing from that Agreement'. The Court did not consider that it would be proper to give a declaratory judgment since the treaty in question was no longer in force and there was no opportunity for a future act of interpretation or application in accordance with the judgment.⁷ Several dissenting judges⁸ saw no objection to the rendering of a declaratory judgment and referred to the *Corfu Channel* case.⁹ The point to be stressed is the fact that for some members of the Court the nature and substance of the Application excluded the view that the question placed before the Court was 'moot'.

Similar issues arose in the *Nuclear Tests* case (*Australia v. France*).¹⁰ In view of the obligation resulting (as the Court saw the matter) from the unilateral declaration made by the French Government concerning its intention to terminate atmospheric tests, the Court found 'that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon'.¹¹

¹ Judgment, p. 29.

² *I.C.J. Reports*, 1959, pp. 120-1.

³ Separate opinion, *I.C.J. Reports*, 1957, p. 39.

⁴ Dissenting opinion, *ibid.*, pp. 98-100.

⁵ See Fitzmaurice, this *Year Book*, 34 (1958), pp. 158-60, with particular reference to the *Haya de la Torre* case, *I.C.J. Reports*, 1951, p. 71 at p. 80. See further Rosenne, *The Law and Practice of the International Court* (1965), vol. 2, pp. 623-30.

⁶ *I.C.J. Reports*, 1963, p. 15 at pp. 32-4.

⁷ *Ibid.*, p. 37. See also Judge Wellington Koo, separate opinion, p. 41; Judge Fitzmaurice, separate opinion, p. 97.

⁸ Judge Badawi, pp. 150-1; Judge Bustamante, pp. 170, 180; and Judge *ad hoc* Bebb Don, p. 196.

⁹ *I.C.J. Reports*, 1949, p. 4.

¹⁰ *I.C.J. Reports*, 1974, p. 253.

¹¹ *Ibid.*, p. 272. The Court made the same finding in respect of the Application of the Government of New Zealand: *ibid.*, p. 457 at p. 478.

In a substantial joint opinion four Judges (Onyeama, Dillard, Jiménez de Aréchaga and Waldock) 'vigorously' dissented. In the Application Australia had asked '*the Court to adjudge and declare that . . . the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law*'. In the view of the joint dissenting opinion the Court was in error in working on the premiss that the sole object of the claim of Australia was 'to obtain a termination of' the atmospheric tests conducted by France. Moreover, 'the declaration of illegality is the basic claim submitted by Australia to the Court', and the 'request for a declaration of the illegality of France's atmospheric nuclear weapon tests cannot be said to be without object in relation to the numerous tests carried out in 1973 and 1974. The declaration, if obtained, would characterize those tests as a violation of Australia's rights under international law.'¹ In another passage the joint opinion states that the Court 'has also failed to recognize the valid role which a declaratory judgment may play in reducing uncertainties in the legal relations of the parties and in composing potential discord'.²

8. *Submissions representing separate bases of claim: judicial selection of issues on which to pronounce*

In certain cases an international tribunal has determined that the several submissions were in a substantive sense separate and distinct. Consequently it was possible to pronounce on some of the submissions to the exclusion of one or more of the others, assuming that there were good reasons for adopting this course. This was the policy adopted by the International Court in respect of the Applicant's submissions in the *Fisheries Jurisdiction* case (*United Kingdom v. Iceland*)³ and also in the *Fisheries Jurisdiction* case (*Federal Republic of Germany v. Iceland*).⁴ Furthermore, in these two cases five judges contributing a joint dissenting opinion accepted the separation of submissions and the consequences ascribed to this by the Court in its reasoning as the premiss for voting with the majority rather than adopting a position of dissent.⁵ Certain of the questions presented in the context of the merits by these two cases will be pursued subsequently.

9. *The ambit of a waiver of claim*

The precise identification of the cause of action would be called for in determining the effects of a waiver of claim. No example of this aspect of waiver of claims can be found in international jurisprudence.⁶

¹ Ibid., pp. 312-19; and, in particular, pp. 312-13, 319. See also the joint dissenting opinion concerning the Application of the Government of New Zealand: *ibid.*, pp. 494-501; and, in particular, pp. 494-5, 501.

² Ibid., p. 321. See also the joint dissenting opinion concerning the Application of the Government of New Zealand: *ibid.*, p. 504.

³ *I.C.J. Reports*, 1974, p. 3.

⁴ Ibid., p. 175.

⁵ Ibid., pp. 45, 217. See further Petré, in *The Future of the International Court of Justice* (edited by Leo Gross) (1976), vol. 2, pp. 445-60, and, in particular, note 5 (on p. 460).

⁶ The *Tattler* Claim (1920), *Reports of International Arbitral Awards*, vol. 6, p. 48, is a spurious example.

10. *The advisory jurisdiction of the International Court in relation to the principle that a State cannot, without its consent, be compelled to submit its disputes with other States to adjudication*

For the present purpose it suffices to state that the characterization of the precise nature of a dispute, including the nature of the wrong or wrongs alleged, may become important when arguments are advanced to the effect that the International Court should decline to accede to a request for an advisory opinion. The most recent example forms a part of the series of objections put forward by Spain in the *Western Sahara* case.¹ The Spanish argument was to the effect that the subject of the questions on which the advisory opinion was requested was substantially identical with the subject of a dispute between Spain and Morocco. Consequently, if the Court dealt with the matter the advisory procedure would be a means of bypassing the consent of States, which was the proper basis of the Court's jurisdiction. The Court did not seek to contradict the principle on which the Spanish Government relied but rejected the contention on the ground that the legal questions of which the Court was seised were materially different in scope from the dispute to which the Spanish objection adverted.²

11. *The strategic requirements of the pleadings*

It is apparent that in international law, as in the context of domestic law, those engaged in drafting pleadings and submissions to tribunals may seek to obtain strategic advantages in the selection, multiplication and general modulation of causes of action. In the *Barcelona Traction* case (*Second Phase*)³ the final submissions of the Belgian Government employed four groups of complaints under the heads: abuse of rights, usurpation of jurisdiction, denials of justice *lato sensu*,⁴ and denials of justice *stricto sensu*.⁴ Without any reference to causal contributions, the various acts and omissions were stated to have had the effect of despoiling the Barcelona Traction Company of the whole of its property.⁵ The compensation claimed was not ascribed to particular categories of illegal acts. No doubt this form of presentation was found to be the most effective, given the complexities of the case, but it may be that over-elaborate deployment of categories involves risks. Thus in the *Barcelona Traction* case the use of 'abuse of rights' in connection with facts which overlapped with the material on which other heads of illegality were grounded was less than happy. In respect of abuse of rights the premiss is the existence of *prima facie* regular and lawful activity of the organs of State and the complainant is accepting a significant burden of proof.

III. A CALENDAR OF CAUSES OF ACTION

In the previous section some technical occasions and reasons for defining the cause of action or subject-matter of a dispute were elaborated upon. The next stage of the enquiry calls for an empirical survey of the causes of action *which*

¹ *I.C.J. Reports*, 1975, p. 12 at pp. 21-3.

² *Ibid.*, pp. 23-7.

³ *I.C.J. Reports*, 1970, p. 4 at pp. 15-25.

⁴ See also below.

⁵ *I.C.J. Reports*, 1970, at p. 23: 'Damage and reparation.'

have been invoked in practice. This will help to set the scene and may have an intrinsic value. In this context 'practice' refers principally to judicial (including arbitral) practice and this involves both positions taken in the pleadings and the views adopted by the tribunal. Such materials represent the practice of States to the extent that they comprise pleadings and claims as such. However, since claims may appear, independently of adjudication, in ordinary diplomatic communications, some evidence of this kind is introduced when it is available. Evidence of modern diplomatic practice is not abundant and the reluctance of States to publish such matter is only one cause of this dearth. A contributory factor is the provisional and urgent nature of some protests: rights are reserved in general terms and protests formulated without the draftsman committing his government to particular legal forms. Moreover, the dictates of caution and ordinary considerations of friendship may preclude immediate reference to formal and precise legal exactions, the diplomatic equivalent of writ waving.

The material which is set forth below is thought to be based upon a reasonably extensive sample of experience but it is not supposed that it is exhaustive. Each example is accompanied by a brief commentary.

1. *Breach of certain obligations under customary international law specified in the pleadings*

It is quite common for the final submissions forming part of the pleadings in adjudicated disputes to refer to 'a breach of obligations under international law' and to relate this breach to the question of State responsibility in explicit terms. Provided the obligations referred to and the alleged breaches thereof are specified sufficiently in the body of the pleadings, the absence of a nominate (so to speak) cause of action in the final submissions creates no problems and attracts no adverse comment from the tribunal.

In the *Corfu Channel* case (*Merits*) the submissions of the United Kingdom concerning the responsibility of Albania (for the damage caused to the British ships by mines) concluded as follows:

(9) That in the circumstances set forth in the Memorial as summarised in the preceding paragraphs of these Conclusions, the Albanian Government has committed a breach of its obligations under international law, and is internationally responsible to . . . the United Kingdom for the deaths, injuries and damage caused to His Majesty's ships and personnel, as set out more particularly in paragraph 18 of the Memorial and the Annexes thereto;

(10) That the Albanian Government is under an obligation to the Government of the United Kingdom to make reparation in respect of the breach of its international obligations as aforesaid;

(11) That His Majesty's Government in the United Kingdom has, as a result of the breach by the Albanian Government of its obligations under international law, sustained the following damage: . . .¹

The Court examined the relevant facts and legal principles and concluded 'that

¹ *I.C.J. Reports*, 1949, p. 4 at pp. 9-11.

Albania is responsible under international law for the explosions which occurred . . . in Albanian waters' without making any observations on the formulation of the submissions presented on behalf of the United Kingdom.¹

In respect of the British operations in Albanian waters on 22 October and on 12 and 13 November 1946, the submissions of the Albanian Government were concluded thus:²

(8) The Court should find that, on both these occasions, the Government of the United Kingdom . . . committed a breach of the rules of international law and that the Albanian Government has a right to demand that it should give satisfaction therefor.

In like manner the Court make no comment upon the formulation of the issues by the Albanian Government.

In the *Nottebohm* case (*Second Phase*) the Memorial of the Government of Liechtenstein submitted that the Court should adjudge and declare that:³

1. The Government of Guatemala in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law and consequently in a manner requiring the payment of reparation.

2. *Breach of certain obligations, specified in the pleadings, arising by virtue of an international agreement*

In a number of cases the merits have been formulated in the Application and in the pleadings exclusively in terms of specified breaches of obligations arising from an international agreement or similar instrument, such as a Trusteeship Agreement: see the *Guardianship of Infants* case,⁴ the *Interhandel* case (*Preliminary Objections*),⁵ and the *Northern Cameroons (Preliminary Objections)* case.⁶ Whilst in some of these cases the issue of reparation may be raised, often the remedy prayed for is simply a declaration. In the *Anglo-Iranian Oil Co.* case (*Preliminary Objection*)⁷ the Application of the United Kingdom (in the alternative) referred to the international responsibility of Iran for the annulment or alteration of an international agreement and expressly asked the Court to furnish 'full satisfaction and indemnity'.

3. *Request for a declaration as to the existence of certain legal rights, powers and duties (specified in the pleadings)*

Another common form of request involves the request for a declaration concerning the existence of certain legal rights, powers and duties, details of which appear in the pleadings: see the Colombian Application in the *Asylum* case;⁸ the Greek Application in the *Ambatielos* case (*Preliminary Objection*);⁹ the Application of the United Kingdom in the *Anglo-Iranian Oil Co.* case (*Preliminary*

¹ *I.C.J. Reports*, 1949, pp. 12-23.

² *Ibid.*, pp. 11-12.

³ *Ibid.*, 1955, p. 4 at pp. 6-7. See also *Nottebohm* case (*Preliminary Objection*), *ibid.*, 1953, p. 111 at pp. 112-13.

⁴ *I.C.J. Reports*, 1958, p. 55 at pp. 58, 61, 62.

⁵ *Ibid.*, 1959, p. 6 at pp. 12-14, 28-9.

⁶ *Ibid.*, 1963, p. 15 at pp. 18-20.

⁷ *Ibid.*, 1952, p. 93 at pp. 95-6.

⁸ *Ibid.*, 1950, p. 266 at pp. 268-9.

⁹ *Ibid.*, 1952, p. 28 at p. 30. See also *Ambatielos* case (*Merits: Obligation to Arbitrate*), *ibid.*, 1953, p. 10 at pp. 12, 14.

Objection), in part;¹ the Application of France in the *Case Concerning Rights of U.S. Nationals in Morocco*;² the Application of Portugal in the *Right of Passage* case (*Preliminary Objections*), in part;³ the Application of Switzerland in the *Interhandel* case (*Preliminary Objections*);⁴ the Honduran submissions in the *Case Concerning the Arbitral Award of the King of Spain*;⁵ the Application of Cambodia in the *Temple* case (*Preliminary Objections*), in part;⁶ and the Applications of Ethiopia and Liberia in the *South West Africa* cases (*Preliminary Objections*).⁷

Such requests for declarations will tend not to raise issues of responsibility under international law either directly or indirectly. However, in certain instances the request was one of several formulations raising the question of responsibility and followed by a prayer for 'full satisfaction and indemnity': see the *Anglo-Iranian Oil Co.* case (*Preliminary Objection*). In the *Interhandel* case the Swiss Application and submissions affirmed that the Government of the United States was 'under an obligation to restore the assets' of *Interhandel*. The Reply of the Government of Honduras in the *Arbitral Award* case stated that the failure to give effect to the Award constituted 'a breach of an international obligation' (see also the Application and Memorial) and concluded by asking the Court to declare 'that this non-execution involves a consequent obligation to make reparation'.

In the *Temple* case (*Merits*) the Cambodian Application asked the Court to declare that Thailand was under an obligation to withdraw its armed forces from the Temple. Moreover, in the Final Submissions Cambodia asked for restitution of the sculptures and other items removed from the Temple by the Thai authorities since 1954.⁸ No reference was made by Cambodia to issues of State responsibility and the Court treated these requests for withdrawal and restitution as 'implicit in, and consequential on, the claim of sovereignty itself'.⁹ Thus the essence of the Application was the question of sovereignty or title and no question of responsibility or reparation arose: that is to say, no such question arose as the case was presented by Cambodia—no doubt such issues could have been raised on the evidence.

The Applications and submissions presented on behalf of Ethiopia and Liberia in the *South West Africa* cases leave open the issue of responsibility for breaches of the Mandate in so far as the Court is not explicitly asked for findings of responsibility or for reparation *in personam*. However, the Court is requested to 'adjudge and declare whatever else it may deem fit and proper in regard to these submissions, and to make all necessary awards and orders . . . to effectuate its determinations'.

¹ Ibid., 1952, p. 93 at pp. 95-6.

² Ibid., 1952, p. 176 at pp. 179-80.

³ Ibid., 1957, p. 125 at pp. 128-9. See also the *Right of Passage* case (*Merits*), *ibid.*, 1960, p. 6 at pp. 9-28.

⁴ Ibid., 1957, p. 6 at pp. 8-10, 12-14.

⁵ Ibid., 1960, p. 192 at pp. 195-7.

⁶ Ibid., 1961, p. 17 at pp. 19-20. See also the *Temple* case (*Merits*), *ibid.*, 1962, p. 6 at pp. 9-11.

⁷ Ibid., 1962, p. 319 at pp. 322-6. See also *South West Africa* cases (*Second Phase*), *ibid.*, 1966, p. 7 at pp. 10-16.

⁸ Ibid., 1962, pp. 10-11.

⁹ Ibid., p. 36.

4. *Request for a declaration that certain acts are contrary to international law and entail the responsibility of the Respondent State*

In the Application of the United Kingdom relating to the *Anglo-Iranian Oil Co.* case the request in the alternative asked the Court 'to declare that the putting into effect of the Iranian Oil Nationalization Act of the 1st May 1951, in so far as it purports to effect a unilateral annulment, or alteration of the terms, of the Convention concluded on the 29th April 1933 . . . would be an act contrary to international law for which the Imperial Government of Iran would be internationally responsible'.¹ The same section of the Application asked the Court 'to adjudge that the Imperial Government should give full satisfaction and indemnity for all acts committed in relation to the Anglo-Iranian Oil Company, Limited, which are contrary to international law or the aforesaid Convention . . . '.

This type of presentation is not objectionable on grounds of uncertainty provided that the specific elements of illegality are given substance in the pleadings and evidence.² Whilst this approach is close to that evident in the cases classified in section 1 above, there is a certain difference. The cases now contemplated directly plead the issue of responsibility for certain acts and their consequences. Thus in the *Case Concerning the Aerial Incident of July 27th 1955 (Preliminary Objections)* the Application of Israel asked the Court 'to adjudge and declare that the People's Republic of Bulgaria is responsible under international law for the destruction of the Israel aircraft 4X-AKC on 27 July 1955 and for the loss of life and property and all other damage that resulted therefrom'.³ The formulation of the Application in this type of case comes to saying that the loss and damage—death, injury, imprisonment, damage to property and so on—is illegal. The 'cause of action' consists of the loss or damage, the lack of legal justification, and the conditions for the imposition of responsibility. The Applicant State may by accident or design create a situation in which no breaches of particular obligations are expressly pleaded⁴ and it is for the Respondent State to plead legal justification or some other basis for avoiding the imposition of responsibility. The loss or damage as such virtually represents the 'cause of action' and the illegality is stated in general terms in the Application.

It is interesting to note that in the *Barcelona Traction* case (New Application: 1962) (*Preliminary Objections*) the Belgian Application requested the Court:⁵

1. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Application are contrary to international law and that the Spanish State is under an obligation to Belgium to make reparation for the consequential damage suffered by Belgian nationals, individuals or legal persons, being shareholders of Barcelona Traction.

¹ *I.C.J. Reports*, 1952, p. 93 at pp. 95–6.

² See the *Award of 30 June 1930 (Portugal v. Germany)*, *Reports of International Arbitral Awards*, vol. 2, p. 1035, at p. 1040, para. 4; *Tinoco Concessions* case, *ibid.*, vol. 1, p. 369.

³ *I.C.J. Reports*, 1959, p. 127 at pp. 129–30.

⁴ Compare the submissions of the United Kingdom in the *Corfu Channel* case (*Merits*), above. See also the *Salem* case, *Reports of International Arbitral Awards*, vol. 2, p. 1161.

⁵ *I.C.J. Reports*, 1964, p. 6 at p. 10; and see also the Memorial, *ibid.*, pp. 10–11. See further *I.C.J. Reports*, 1970, p. 4 at p. 12.

There can be no doubt that in the complicated circumstances of the *Barcelona Traction* case such a generalized formula has few advantages and carries certain risks. In its final submissions¹ and, more diffusely, in the written pleadings, the Belgian Government selected certain nominate causes of action: abuse of rights; usurpation of jurisdiction; denials of justice *lato sensu*; and denials of justice *stricto sensu*.

In the *Fisheries Jurisdiction* case (*Merits*)² the Memorial of the United Kingdom contained a request that the Court should adjudge and declare 'that activities by the Government of Iceland such as are referred to in Part V of this Memorial, that is to say, interference by force or the threat of force with British fishing vessels operating in the said area of the high seas, are unlawful and that Iceland is under an obligation to make compensation therefor . . .'. In the case brought by the United Kingdom this submission was withdrawn³ but in the case brought by the Federal Republic of Germany the Court criticized a similar submission by reason of its abstract form and the relative absence of an indication in concrete form of the damages for which compensation was required.⁴

5. *Request for a declaration as to the validity of a method of delimiting a fisheries zone, an expropriatory measure, etc.*

The purpose of the Application by the United Kingdom in the *Fisheries* case⁵ was to obtain a declaration concerning the validity in general international law of the Norwegian system of delimiting a fisheries zone by means of straight base-lines. What was involved was an action for a declaration and the issue was one of legal status comparable with public law issues of *vires*. The United Kingdom also asked for damages in respect of interferences with British fishing vessels. In the Conclusions this request was framed as follows:

(14) That Norway is under an international obligation to pay to the United Kingdom compensation in respect of all the arrests since 16th September 1948, of British fishing vessels in waters which are high seas by virtue of the application of the preceding principles.

In the event the Parties agreed to leave this question to subsequent settlement if it should arise. However, the question which remains is whether this request would have brought the case into the category of a claim based upon the imposition of State responsibility. It is thought not. There is a close parallel with the *Temple* case (*Merits*).⁶ In that case such subsidiary requests (though admittedly not involving compensation) were held by the Court to be subsidiary to, and consequential upon, the claim of sovereignty itself. Likewise, in the *Fisheries* case it was the question of status, or *vires*, or title (in a special sense) that was the substantial issue.

The Application of the United Kingdom in the *Anglo-Iranian Oil Co.* case

¹ *I.C.J. Reports*, 1970, p. 4 at pp. 15-23.

² *Ibid.*, 1974, p. 3 at p. 7.

³ Subsequently the Court was informed that the Government of the United Kingdom had decided not to pursue this submission (d) in the Memorial in view of the conclusion of an interim agreement on 13 November 1973.

⁴ *I.C.J. Reports*, 1974, p. 175 at pp. 179, 203-5.

⁵ *Ibid.*, 1951, p. 116 at pp. 118-19 and see also the submissions and Conclusions set forth at pp. 119-23.

⁶ See above.

included a request that the Court declare 'that the aforesaid Convention cannot lawfully be annulled, or its terms altered, by the Imperial Government of Iran, otherwise than as the result of agreement with the Anglo-Iranian Oil Company, Limited, or under the conditions provided for in Article 26 of the Convention'.¹ In view of the over-all structure and content of this Application the issue of State responsibility was predominant, and the request for 'restitution' of rights under the Convention appears to have been ancillary to the final request for 'full satisfaction and indemnity' for all the acts which were contrary to international law.²

6. *Violation of the sovereignty of a State*

In the *Corfu Channel* case (*Merits*)³ the following question was put to the Court in the second part of the Special Agreement:

(2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?

The Court found no difficulty in approaching the issues presented in this form⁴ and there is little doubt that violation of the sovereignty of a State by specified acts is a sufficient cause of action.

The Australian Application in the *Nuclear Tests* cases⁵ stated that 'the deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent . . . violates Australian sovereignty over its territory'. Neither the Court nor the joint dissenting opinion of four Judges found it necessary to express any view on the legal substance of the assertion.⁶

7. *Request for a determination whether sovereignty (title) over certain territory (including islands, islets and rocks) belongs to State A or State B*

This formulation appears in the Special Agreements relating to the *Island of Palmas* arbitration,⁷ the *Clipperton Island* arbitration,⁸ the *Minquiers and Ecrehos* case,⁹ and the *Frontier Land* case.¹⁰ Whilst such cases stem from the form of the Special Agreements, they involve requests for the normal exercise of the judicial function in making a declaration of title. However, no element of State responsibility is invoked, for example, for usurpation and wrongful possession, removal of natural resources and other acts of waste. No 'cause of action' is involved, apart from the issue of title.

¹ *I.C.J. Reports*, 1952, p. 93 at pp. 95-6. Cf. the French submissions in the *Norwegian Loans* case, *ibid.*, p. 9 at pp. 17-18 (On the Merits, paras. 1 and 3).

² See Mann, this *Year Book*, 48 (1976-7), p. 1 at pp. 12-13, and especially at p. 13, n. 6.

³ *I.C.J. Reports*, 1949, p. 4 at pp. 6-7.

⁴ *Ibid.*, 1949, p. 4 at pp. 26-35. See also the Canadian claim against the U.S.S.R., *International Legal Materials*, vol. 18, p. 899 at p. 907 (para. 21).

⁵ *I.C.J. Pleadings, Nuclear Tests*, vol. I, p. 14, para. 49; and see pp. 335-6, paras. 451-5.

⁶ See the joint dissenting opinion, *I.C.J. Reports*, 1974, p. 312 at pp. 369-70 (para. 117).

⁷ *Reports of International Arbitral Awards*, vol. 2, p. 829 (1928).

⁸ *Ibid.*, vol. 1, p. 1105 (1931).

⁹ *I.C.J. Reports*, 1953, p. 47.

¹⁰ *Ibid.*, 1959, p. 209.

8. *Request for a declaration that sovereignty (title) over certain territory (including islands, islets and rocks) belongs to the Applicant (or Respondent) State*

The Application of the Government of Cambodia in the *Temple case (Merits)*¹ asked the Court to adjudge and declare 'that the territorial sovereignty over the Temple of Preah Vihear belongs to the Kingdom of Cambodia'. In its Counter-Memorial the Government of Thailand made a similar request.² In spite of the fact that Cambodia made additional requests concerning the withdrawal of Thai armed forces and the restoration of sculptures and other objects,³ the Court treated these requests as 'implicit in, and consequential on, the claim of sovereignty itself'.⁴ In its judgment of 1961 the Court had stated: 'This is a dispute about territorial sovereignty . . .'.⁵ No question of responsibility or reparation arose. The issue was that of title and no 'cause of action' was involved beyond the dispute concerning sovereignty over the region of Preah Vihear. In the *Beagle Channel case*⁶ the Arbitration Agreement (*Compromiso*) concluded by the Argentine Republic and the Republic of Chile contained requests to the Arbitrator confined to the issue of title, but in the case of the Argentine Republic also referring to the determination of a 'boundary-line between the respective maritime jurisdictions'.

Joint requests addressed to an Arbitrator in an Arbitration Agreement (*Compromis*) to effect the delimitation of a boundary raise what is essentially the same issue, since the question of title will follow the delimitation once effected.⁷

9. *Violation of the right to be free from atmospheric nuclear weapon tests*

The Australian Application in the *Nuclear Tests* cases contains the following statement:⁸

The Australian Government contends that the conduct of the tests as described above has violated and, if the tests are continued, will further violate international law and the Charter of the United Nations, and, *inter alia*, Australia's rights in the following respects:

(i) The right of Australia and its people, in common with other states and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated; . . .

The finding of the Court⁹ that the claim of Australia no longer had any object had no bearing upon the precise issues which Australia sought to raise. Moreover, the joint dissenting opinion¹⁰ of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock expressed the view, which was in form preliminary, that the right asserted by Australia was 'a part of the general legal merits of the case'.¹¹

¹ Ibid., 1962, p. 6 at p. 9.

² Ibid., p. 10.

³ Ibid., pp. 10-11.

⁴ Ibid., p. 36.

⁵ Ibid., 1961, p. 17 at p. 22; and see *ibid.*, 1962, p. 14.

⁶ *Award; Report and Decision of the Court of Arbitration* (London, H.M.S.O.); Republic of Chile, *Controversy Concerning the Beagle Channel Region: Award* (bilingual edition, 1977).

⁷ See the Report and Decision of the Court of Arbitration, *Beagle Channel case, Dispositif*, para. 1 (iii).

⁸ *I.C.J. Pleadings, Nuclear Tests*, vol. I, p. 14, para. 49.

⁹ *I.C.J. Reports*, 1974, p. 253 at p. 272.

¹⁰ Ibid., p. 312 at pp. 358-71.

¹¹ Ibid., pp. 369-70 (para. 117).

10. *Violation of the 'decisional sovereignty' of a State*

Normally the concept of violation of sovereignty is based upon the model of trespass against the parcel of State territory, territorial sea and air space: see section 6 above. However, it is not unreasonable to propose the concept of 'decisional sovereignty', that is, the impairment of the independent right of a State to determine what acts shall take place within its territory. The Australian Application in the *Nuclear Tests* cases asserted a particular violation of international law by France by means of the following formulation:¹

The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent . . . (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources; . . .

The finding of the Court² that the claim of Australia no longer had any object had no bearing upon the precise legal issues which Australia sought to raise. Moreover, the joint dissenting opinion³ of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock expressed the view, albeit in a preliminary way, that such questions were 'a part of the general legal merits of the case'.⁴ The same opinion raised the question whether material damage was an 'essential element in any such alleged rule[s]' concerning 'decisional sovereignty'.⁵

11. *Infringement of the freedom of the high seas*

In a good number of arbitrations the ground of claim has been illegal interference with vessels on the high seas.⁶ It was on this basis that the Application of the United Kingdom in the *Fisheries* case⁷ asked for compensation 'in respect of all interferences by the Norwegian authorities with British fishing vessels outside the zone which . . . the Norwegian Government is entitled to reserve for its nationals'.

The Australian Application in the *Nuclear Tests* cases asserted a particular violation of international law by France by means of the assertion that:⁸

The interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitute infringements of the freedom of the high seas.

The finding of the Court⁹ (that the claim of Australia no longer had any object) had no bearing upon the precise legal issues which Australia sought to raise.

¹ *I.C.J. Pleadings, Nuclear Tests*, vol. I, p. 14, para. 49; and see further *ibid.*, pp. 335-6, paras. 451-5 and, in particular, para. 454.

² *I.C.J. Reports*, 1974, p. 253 at p. 272.

³ *Ibid.*, p. 312 at pp. 358-71.

⁴ *Ibid.*, p. 369 (para. 1117).

⁵ *Ibid.*, p. 369 (para. 1116).

⁶ *The Jessie, Reports of International Arbitral Awards*, vol. 6, p. 57; *The Wanderer*, *ibid.*, p. 68; *The Kate*, *ibid.*, p. 77; *McLean* claim, *ibid.*, p. 83; *The Carthage*, *ibid.*, vol. 11, p. 449; *The Manouba*, *ibid.*, p. 463.

⁷ *I.C.J. Reports*, 1951, p. 116 at pp. 118-19; and see further *ibid.*, pp. 119-21 (Submissions, para. 13), and pp. 121-3 (Conclusions, para. 14).

⁸ *I.C.J. Pleadings, Nuclear Tests*, vol. I, p. 14, para. 49; and see further *ibid.*, pp. 337-8 (paras. 457-60).

⁹ *I.C.J. Reports*, 1974, p. 253 at p. 272.

However, the joint dissenting opinion of four Judges clearly accepted that issues concerning the merits could be raised in this form, without prejudging the validity of the precise application of the principle contended for by Australia.¹

12. *Abuse of rights; arbitrary and discriminatory attitude of the administrative authorities of the Respondent State*

In his work *The Development of International Law by the International Court*, published in 1958,² Sir Hersch Lauterpacht wrote: 'Another instance of judicial legislation by way of an application of a general principle of law is the manner in which the Court, in resorting to the doctrine of abuse of rights, lent its authority to the creation of a new source of international responsibility.' The importance of abuse of rights has also been maintained by Dr. F. A. Mann.³ The present writer⁴ has expressed reservations concerning the precise role, as an independent and necessary principle, of the doctrine of abuse of rights. A major issue is the logical question-begging involved: to be relevant the doctrine must presuppose that the legal validity of the exercise of a power or privilege is dependent upon the presence of certain objectives.

The contexts in which attempts have been made to make tactical use of abuse of rights strongly suggest that the doctrine is the *alter ego*, on different occasions, of two related but distinct principles. The first of these is the principle of non-discrimination, which probably exists in its own right.⁵ The second principle consists of the presumption that there is State responsibility for harm intentionally caused unless there is some distinct ground of privilege. When the mechanism for inflicting the premeditated consequences consists of the ordinary techniques of administration and judicature then there is some temptation to describe the process as an 'abuse of right'.

The Belgian final submissions in the *Barcelona Traction* case (*Second Phase*)⁶ employed the heading 'abuse of rights, arbitrary and discriminatory attitude of certain administrative authorities'. The rubric was amplified thus: 'considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, . . . [certain tactics were then alleged].' The tactics alleged involved the use of the mechanism of monetary control. The final submissions on behalf of Belgium contended in general terms that the various acts and omissions for which the Spanish authorities were responsible 'converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation of the

¹ Ibid., pp. 370-1 (para. 118).

² Pp. 162-5; at p. 162.

³ *Recueil des cours*, 96 (1959-I), p. 1 at pp. 92-5; id., *The Legal Aspect of Money* (3rd edn., 1971), pp. 496-504; id., *Studies in International Law* (1973), pp. 305-8. For a recent general study see Taylor, this *Year Book*, 46 (1972-3), pp. 323-52.

⁴ *Principles of Public International Law* (3rd edn., 1979), pp. 443-5.

⁵ See Mann, *Recueil des cours*, 96 (1959-I), at p. 93; and see below, section 30.

⁶ *I.C.J. Reports*, 1970, p. 4 at p. 17.

undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group'. The Court did not have occasion to deal with the merits of the case.¹

13. *Usurpation of jurisdiction*

The issue of jurisdiction may be, and often is, presented as a matter of validity or *vires*, but it can also involve the question of State responsibility. The case of *The Lotus*² was submitted to the International Court by means of a special agreement which formulated the question relating to the legality of the criminal proceedings instituted against the officer of the watch on board *The Lotus*. The second question, which depended on a finding of illegality, was: 'what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?' The judgment of the Court did not deal with this question in view of the decision that the Turkish authorities had not acted illegally. The dissenting opinions of Judges Loder, Weiss, Lord Finlay, Nyholm, Moore and Altamira contain no reservations relating to the formulation of the issues in the special agreement.

The Belgian final submissions in the *Barcelona Traction* case (*Second Phase*)³ employed the formula 'usurpation of jurisdiction' in a pleading which explicitly raised issues of State responsibility for internationally unlawful acts.⁴ The specific complaints related to the exercise of bankruptcy jurisdiction by the Spanish courts in respect of Canadian registered companies and property situated outside Spanish territory. The Court did not have occasion to examine the merits of the case. However, in a separate opinion Judge Tanaka examined the substantial issues of law raised by Belgium on the merits. Judge Tanaka did not question the formulation in terms of 'usurpation of jurisdiction'; however, he observed⁵ that the various irregularities allegedly committed by the Spanish Courts in the bankruptcy judgment and the consequential judicial acts were included in the concept of denial of justice *lato sensu* (on which see below).

14. *Denial of justice: manifestly erroneous application of the relevant law, arbitrariness or discrimination in performance of judicial duties*

Any degree of familiarity with the materials of international law reveals the variety of meanings accorded to the phrase 'denial of justice' in the sources.⁶ The label itself does not give a sufficient indication of the basis of State responsibility asserted to exist: but the difficulties of nomenclature do not deny the reality of the particular and independent heads of liability. The present form involves

¹ Judge Tanaka, in a separate opinion, explored the merits but neglected to study abuse of rights: he considered that the complaints of Belgium were all related to a denial of justice, in the wider sense (*I.C.J. Reports*, 1970, p. 150).

² *P.C.I.J.*, Series A, No. 10. Similar issues arose in the *McLeod* case: see Jennings, *American Journal of International Law*, 32 (1938), p. 82 at pp. 96-9; and Moore, *Arbitrations*, vol. 3, pp. 2419-28.

³ *I.C.J. Reports*, 1970, p. 4 at pp. 17-18.

⁴ See the final submissions, *ibid.*, p. 24 (Part V).

⁵ *I.C.J. Reports*, 1970, p. 151.

⁶ See the interesting passages in the opinion of Van Vollenhoven in the *Chattin* claim, *Reports of International Arbitral Awards*, vol. 4, p. 282, at pp. 285-8 (paras. 6-11).

breaches of an international standard of fair treatment by the judicial machinery itself. Early examples of the genre include the *Affaire Martini*.¹

The final submissions of the Belgian Government in the *Barcelona Traction* case (*Second Phase*)² included a section of complaints under the head 'denials of justice *lato sensu*'. The pleading as to the principle ran: 'Considering that a large number of decisions of the Spanish Courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice *lato sensu*.' The specific allegations relating to this head involved the evolution of the bankruptcy proceedings and the culmination in the sale of the property of the bankrupt company to the March group. The Court did not examine the merits of the case, but in his separate opinion Judge Tanaka examined the issues of law raised by the Belgian Government on the merits. Essentially Judge Tanaka applied the concept of the international minimum standard in the manner appropriate to the acts and omissions of judicial organs.³ It is not necessary to examine the precise formulations adopted by the distinguished Judge. The significant aspect of the opinion is its insistence on examining the general issue of State responsibility in the light of the relevant standards. The standards are given more importance than the category denial of justice with or without the embellishment '*lato sensu*'. It should be recorded that the classification of the forms of 'denial of justice' employed in the Belgian written pleadings avoided the distinction between the forms *lato sensu* and *stricto sensu*.⁴ The *general* approach in the written pleadings⁵ in this respect would seem to accord with that adopted by Judge Tanaka.

15. *Denial of justice stricto sensu*

In the *Barcelona Traction* case (*Second Phase*)⁶ the final submissions of the Belgian Government included, in addition to the head 'Denials of justice *lato sensu*', a section of complaints entitled 'Denials of justice *stricto sensu*'. The burden of this group of complaints was the acts and omissions which were alleged to constitute a serious disregard of the defence in the course of the bankruptcy proceedings. The circumstances referred to included the proceedings in the Reus court which adjudicated *Barcelona Traction* bankrupt on an *ex parte* petition. Other complaints related to delays of many years after the bankruptcy judgment without the bankrupt company 'having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment . . . '.

The Court did not examine the merits of the case. However, in his separate opinion Judge Tanaka examined the issues of merits presented by the Belgian Government.⁷ This examination placed no significance upon the category 'denials of justice *stricto sensu*' and the learned Judge was concerned to apply the relevant standards of international law to the particular acts and omissions

¹ *Reports of International Arbitral Awards*, vol. 2, p. 975.

² *I.C.J. Reports*, 1970, p. 4 at pp. 18-22.

³ *Ibid.*, pp. 150-60, at p. 156 in particular.

⁴ See the *Réplique du Gouvernement Belge*, 1967, Part II, Chap. II, sections VI, VII and VIII.

⁵ *Ibid.*, pp. 306-8, paras. 441-9.

⁶ *I.C.J. Reports*, 1970, p. 4 at pp. 22-3.

⁷ *Ibid.*, pp. 150-60.

alleged. Moreover, in the written pleadings the Belgian Government employed somewhat different terminology whilst grouping together 'les dénis de justice proprement dits dans la procédure'.¹

The general approach adopted by Judge Tanaka in his separate opinion is to be commended. The various complaints relating to the conduct of the judicial organs must be measured against the pertinent international standard and the applicable principles governing State responsibility. The invention of categories of denial of justice, though helpful in organizing the structure of extended pleadings, is not a matter of fundamental importance. Over the years various attempts have been made to fashion a 'narrow' definition of denial of justice² but there seems to be little or no point in such exercises. Lissitzyn³ was correct in his view that: 'the determination of particular controversies has almost never depended upon the meaning attached to this term. In almost all cases the real question has always been whether or not a State was responsible internationally for a particular act or omission, and not whether such an act or omission can be called denial of justice.'

16. *Failure to comply with international standards as a basis for State responsibility*

Many claims are based upon specific injury or loss arising from a failure by the agencies of the Respondent State to measure up to international standards. In some American sources and the jurisprudence of the Mexican-United States General Claims Commission the term 'denial of justice' has been employed to describe such liabilities, but this does not affect the substance of the matter. The formulation of the Commission in the *Neer* claim⁴ is useful and classical:

... it is possible ... to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

This objective standard has been applied to cases involving allegations of failure to apprehend or punish those guilty of murder of an alien,⁵ wrongful arrest,⁶ imprisonment in sub-standard conditions,⁷ the killing of an alien by a border patrol,⁸ and so forth. In the sections which follow consideration will be given to the use of the categories of 'damage' or 'consequence' as the basis of claims. Thus the claim may be classified in terms of 'wrongful death', 'wrongful

¹ See *Réplique du Gouvernement Belge*, 1967, Part II, Chap. II, section VI.

² See the *Chattin* claim, *Reports of International Arbitral Awards*, vol. 4, p. 282, paras. 7-11.

³ *American Journal of International Law*, 30 (1936), p. 632 at p. 645. The passage is quoted with approval in Briggs, *The Law of Nations* (2nd edn., 1953), p. 679.

⁴ *Reports of International Arbitral Awards*, vol. 4, p. 60, para. 4.

⁵ *Neer* claim, *ibid.*; *Janes* claim, *ibid.*, p. 32; *Youmans* claim, *ibid.*, p. 110; *Massey* claim, *ibid.*, p. 155 (reference to 'denial of justice'); *Borchgrave* case, *P.C.I.J.*, Series C, No. 83, p. 11 (Belgian Memorial) at pp. 29-32 (reference to 'denial of justice').

⁶ *Faulkner* claim, *Reports of International Arbitral Awards*, vol. 4, p. 67.

⁷ *Faulkner* claim, *supra*; *Roberts* claim, *ibid.*, p. 77.

⁸ *García and Garza* claim, *ibid.*, p. 119, paras. 4, 5.

detention', 'confiscation of property' and so forth. The question presented, but which may be reserved for the present, is what, if any, significance or practical effect results from the formulation in terms of the particular 'damage' or 'consequence'.

17. *Unlawful killing or wounding*

In principle the killing of an alien without any reasonable cause or necessity by the acts of soldiers or others acting under orders is a clear breach of the international minimum standard. Thus in the *García and Garza* claim¹ the killing of a Mexican citizen by a United States border patrol was held to create responsibility as a breach of the international standard. The killing was not justified by the exigencies of law enforcement in face of unauthorized border crossing. Responsibility will not arise from the act of a drunken army officer while off duty.² Of course, in the latter case responsibility may arise for failure to act with due diligence in the apprehension and punishment of the culprit. Killing in the carrying out of military acts in the course of a battle would not be unlawful.³ The same general issue of legality is present in the correspondence between Great Britain and the United States relating to the *McLeod* case. McLeod had taken part in the officially supported operation against the *Caroline*, in the course of which a United States citizen had lost his life. The British Government was of the opinion that the action against the *Caroline* was legally justified by the principle of self-preservation (or self-defence) and that, consequently, the arrest and trial of McLeod on a charge of murder by the United States' authorities had no legal basis.⁴ However, the main ground of British complaint was the principle that, since McLeod had acted under the authority of his Government, he was not to be held liable as a private malefactor.

These cases present no substantial difficulties but one issue calls for some examination. In a number of cases it is probably a matter of no consequence whether the claim is presented as a breach of the international standard or as a claim for 'wrongful death', et cetera. However, in some cases it would appear that the use of the form of action which employs the category of 'damage' or 'consequence' has the effect, or is allowed to have the effect by the tribunal, that the Respondent State has the burden of exculpation. This is particularly the case when the harm is caused by the agencies of the Respondent State acting under orders⁵ or within the scope of their apparent authority.⁶ Relatively recent claims for unlawful killing include the claims against Bulgaria arising from the destruction

¹ Ibid., vol. 4, p. 119, paras. 4, 5. Cf. also the *Caire* claim, ibid., vol. 5, p. 516.

² *Morton* claim, ibid., vol. 4, p. 428. See also the *Gordon* claim, ibid., p. 586.

³ *Mallard* claim, ibid., vol. 5, p. 243. See para. 5 of the decision where it is made clear that neither of the two contending factions were regarded as revolutionaries for the purpose of the decision and the relevant Special Agreement of 1926.

⁴ For an account of the whole episode see Jennings, *American Journal of International Law*, 32 (1938), p. 82 and, in particular, at pp. 92-6.

⁵ *García and Garza* claim, *Reports of International Arbitral Awards*, vol. 4, p. 119. See also the *Cadenhead* claim, ibid., vol. 6, p. 40, where the principle of national treatment was applied.

⁶ *Caire* claim, ibid., vol. 5, p. 516 at p. 530.

of an Israeli airliner in 1955 presented by Israel,¹ Canada, the United Kingdom, the Union of South Africa and the United States.²

When the wounding or death arises from a failure to provide adequate protection for aliens, then the imposition of responsibility will depend upon a lack of appropriate care or 'due diligence' and *prima facie* liability will not normally arise in such circumstances, as it does when the harm is caused directly by State agencies acting under orders.

18. *Unlawful detention and internment*

In the *Nottebohm* case (*Preliminary Objection*)³ the claims submitted in the Liechtenstein Application referred, *inter alia*, to international responsibility 'incurred . . . by the unjustified detention, [and] internment of Mr. Nottebohm'. International claims for wrongful arrest and detention are a familiar aspect of diplomatic practice⁴ and international jurisprudence.⁵ The general position would seem to be similar to that in respect of unlawful killing or wounding. However, certain claims are in respect of errors of judicial organs giving rise to unjustified imprisonment and in such cases the detention is the 'damage' element in the breach of the relevant international standard concerning the performance of judicial organs.⁶

19. *Unlawful expulsion*

Whilst it is widely accepted that States have a power to expel aliens, it is the case that, even apart from treaty restrictions, general international law sets certain limits to the occasion and, more particularly, the modalities of expulsion. It is not the present purpose to explore the limits of the power of expulsion.⁷ The fact remains that the practice includes claims for wrongful expulsion. In the *Nottebohm* case (*Preliminary Objection*)⁸ the claims submitted in the Liechtenstein Application referred, *inter alia*, to international responsibility 'incurred . . . by the unjustified . . . expulsion of Mr. Nottebohm'. The Liechtenstein Memorial referred to the acts of the Government of Guatemala in 'expelling and refusing to readmit Mr. Nottebohm'.⁹ However, on closer examination the claims based upon expulsion, not numerous in any case, are seen to be founded upon collateral but by no means subordinate circumstances. Thus the Liechtenstein Memorial in *Nottebohm* was based upon abuse of rights. Other

¹ See section 4 above.

² For a helpful account see Cole, this *Year Book*, 41 (1965-6), p. 368 at pp. 385-90; and see also Whiteman, *Digest*, vol. 8, pp. 885-906.

³ *I.C.J. Reports*, 1953, p. 111 at pp. 112-13; and see also *ibid.*, 1955, p. 4 at pp. 6-7.

⁴ See Whiteman, *Digest*, vol. 8, pp. 863-85; Hackworth, *Digest*, vol. 5, pp. 597-610.

⁵ *Faulkner* claim, *Reports of International Arbitral Awards*, vol. 4, p. 67; *Roberts* claim, *ibid.*, p. 77; *The Lottie May* incident, *ibid.*, vol. 15, p. 23; *Chevreau* case, *ibid.*, vol. 2, p. 1113.

⁶ *Perry* claim, *ibid.*, vol. 6, p. 315; and see the dissenting opinion of the Panamanian Commissioner, pp. 319-21.

⁷ See *British Digest of International Law*, vol. 6, pp. 112-208; Whiteman, *Digest*, vol. 8, pp. 850-63; Goodwin-Gill, this *Year Book*, 47 (1974-5), pp. 55-156; *id.*, *International Law and the Movement of Persons Between States* (1978), Part III.

⁸ *I.C.J. Reports*, 1953, p. 111 at pp. 112-13.

⁹ *Ibid.*, 1955, p. 4 at pp. 6-7; *I.C.J. Pleadings*, *Nottebohm* case, pp. 48, 53.

claims are concerned with the unnecessary consequences of inconsiderate and arbitrary expulsion resulting in personal injury or privation and loss of property.¹

The quality of 'expulsion' as a cause of action is determined by the general legal setting. *Prima facie* there is a power of expulsion and therefore the claimant State has to prove the conditions of illegality, the existence of arbitrary conduct or discrimination and so forth. In brief, and expressed as a provisional view, there is no *prima facie* liability as in the cases of wrongful killing and wounding. Normally the Respondent State will not have the burden of exculpation, but circumstances may produce a different outcome. For example, a mass expulsion, involving deliberately contrived conditions of hardship, and resting upon explicit considerations of political reprisal or racial discrimination, would lead to a *prima facie* liability for wrongful infliction of personal injuries,² and for breach of the independent principle of non-discrimination in racial matters.³ In addition the category abuse of rights would apply: see section 12 above.

20. *Unlawful confiscation or expropriation of property*

International claims based upon deprivation of interests in property are familiar enough. The substance and not the terminology determines the legal consequences and the terminology is not settled. Confiscation is generally used to describe takings without any, or adequate, compensation. In the *Nottebohm* case (*Preliminary Objection*)⁴ the claims submitted in the Liechtenstein Application referred, *inter alia*, to international responsibility 'incurred . . . by the sequestration and confiscation of [Mr. Nottebohm's] property'. In its Memorial the Government of Liechtenstein asked the Court to declare that 'in seizing and retaining [Mr. Nottebohm's] property without compensation' the Government of Guatemala had acted in breach of its obligations under international law.⁵ The jurisprudence of international tribunals contains many claims relating to 'confiscation of property'.⁶

In normal circumstances the issue of responsibility will be resolved in terms of the conditions of the taking. As in the case of expulsion, there may be liability arising under collateral circumstances. On the view that the power of expropriation is a normal concomitant of territorial sovereignty,⁷ the burden of proof of illegality would normally have to be discharged by the Claimant State. However, confiscation stemming from general policies of discrimination or political reprisal would produce a situation in which the Respondent State would have a burden of exculpation in respect of the class of persons so affected.

¹ See Goodwin-Gill, this *Year Book*, 47 (1974-5), pp. 131-3.

² See above, section 17.

³ See below, section 30.

⁴ *I.C.J. Reports*, 1953, p. 111 at pp. 112-13.

⁵ *Ibid.*, 1955, p. 4 at pp. 6-7.

⁶ *McMahan* claim, *Reports of International Arbitral Awards*, vol. 4, p. 486; *Davies* claim, *ibid.*, p. 517; *Chazen* claim, *ibid.* p. 564; *Santa Rosa Mining Company* claim, *ibid.*, vol. 5, p. 252.

⁷ Cordell Hull, Note dated 21 July 1938 to the Mexican Government; text in Briggs, *The Law of Nations* (2nd edn., 1953), p. 556; Hackworth, *Digest*, vol. 3, p. 655.

21. *Unlawful destruction of and damage to property*

In principle the destruction of or infliction of damage upon the property of an alien without any reasonable cause or necessity by the acts of soldiers or others acting under orders is a clear breach of the international minimum standard.¹ The cases of looting of property are to be treated on the same basis.² No liability arises from acts of military necessity.³ However, liability may arise from lack of reasonable care.⁴ The issues of general principle which arise are similar to those relating to unlawful killing or wounding: see section 17 above. In the case of looting and other losses to aliens in the course of civil war the responsibility rests upon a standard of due diligence.⁵

22. *Seizure and detention of property (deprivation of possession)*

A number of claims have involved loss of possession of property, including houses, caused by the acts of soldiers or other agents of the Respondent State.⁶

23. *Unlawful seizure of vessels*

A variety of claims involve seizures of vessels by State agencies either in port⁷ or in territorial waters⁸ or on the high seas⁹ without justification according to rules of customary international law,¹⁰ or in breach of treaty obligations. There is good reason and some authority for the view that in the case of visit and search of vessels on the high seas in time of peace, the burden of proof lies upon the Respondent State to show that its naval authorities acted under special agreement.¹¹ This consideration strongly indicates the correctness of pleading 'unlawful seizure' as such and not treating seizure on the high seas simply as a type of interference with the freedom of the high seas.¹² In the case of the right of visit and

¹ See the statement of principle in the *Venables* claim, *Reports of International Arbitral Awards*, vol. 4, p. 219, para. 21. See also the *Zafiro* case, *ibid.*, vol. 6, p. 160; *Vásquez Díaz* claim, *ibid.*, p. 341; and the *Aerial Incident* case, on which see sections 4 and 17 above. See further Whiteman, *Digest*, vol. 8, pp. 969-80; Hackworth, *Digest*, vol. 5, pp. 682-709.

² *Scribner* claim, *Reports of International Arbitral Awards*, vol. 5, p. 295.

³ *Hardman* claim, *ibid.*, vol. 6, p. 25; *Iloilo* claims, *ibid.*, p. 158.

⁴ *Great Northwestern Telegraph Company of Canada (Great Britain) v. United States*, *ibid.*, p. 35; *Sivewright, Bacon and Co. (Great Britain) v. United States*, *ibid.*, p. 36. Cf. also the *Iloilo* claims, *ibid.*, p. 158.

⁵ *Sessarego* claim, *ibid.*, vol. 15, p. 400; *Sanguinetti* claim, *ibid.*, p. 403; *Vercelli* claim, *ibid.*, p. 406; *Queirolo* claim, *ibid.*, p. 407; *Roggero* claim, *ibid.*, p. 408.

⁶ A number of claims of this type were based upon a Convention allowing liability for the acts of revolutionary forces: see *Howard* claim, *ibid.*, vol. 5, p. 232; *Kennedy* claim, *ibid.*, p. 240; *El Palmar Rubber Estates* claim, *ibid.*, p. 281; *Palmarejo and Mexican Gold Fields* claim, *ibid.*, p. 298 at p. 302 (para. 5).

⁷ *Hoff* claim, *ibid.*, vol. 4, p. 444; *The Coquitlam* claim, *ibid.*, vol. 6, p. 45; *The Lottie May* incident, *ibid.*, vol. 15, p. 23.

⁸ *The Argonaut and the Colonel Jonas H. French* claims, *ibid.*, vol. 6, p. 60; *Jesse Lewis* claim, *ibid.*, p. 85.

⁹ *The Wanderer* claim, *ibid.*, vol. 6, p. 68; *The Kate* claim, *ibid.*, p. 77; *McLean* claim, *ibid.*, p. 82.

¹⁰ See also the *Bethune* claim, *ibid.*, vol. 6, p. 32; *The R. T. Roy* claim, *ibid.*, p. 147; *The David* claim, *ibid.*, p. 382.

¹¹ *The Wanderer* claim, *ibid.*, vol. 6, p. 68 at p. 71.

¹² See section 17 above; and also *The Jessie, the Thomas F. Bayard and the Pescawha*, *Reports of International Arbitral Awards*, vol. 6, p. 57.

search in time of war, the question of legality may be raised in general terms and no burden of exculpation is placed upon the Respondent State.¹

24. *Claims arising from maritime collisions*

International tribunals have often imposed responsibility for damage resulting from collisions between merchant vessels and public vessels. In certain such cases, when the collision has occurred in territorial waters, the tribunals have applied the principle that the law applicable to the determination of fault is the *lex loci delicti commissi*.² Without exploring the issues fully, it may be observed that there is no objection in principle to incorporating rules of conflict of laws in such cases. However, such rules must comply with the standard of international law. Moreover, the United States Commissioner, Nielsen, was surely correct when, in *The Daylight* claim,³ he expressed the view that: 'the recognition of the proper application of the rule [involving application of the *lex loci delicti commissi*] in any given case would . . . not necessitate the conclusion that an international tribunal would be impotent to determine liability based on the *general rule of international law* (italics in the original) and the facts in a case in which it may appear that there is no applicable local admiralty law or is a law the effect of which may be to deny responsibility for a clearly wrongful act.'

25. *Wrongful interference with neutral property*

Wrongful interference with neutral property in time of war gives rise to State responsibility.⁴ Several claims relate to unlawful seizure of vessels on the high seas.⁵

26. *Contract claims*

The status of State contracts is a matter of acute controversy.⁶ One view is that the question of breach is a matter exclusively of domestic law, that is, the rules of private international law, in the absence of a confiscation, denial of justice or other collateral breach of international law. Another view is that certain categories of State contracts, such as 'foreign investment agreements', are 'agreements valid in international law', breach of which gives rise to State responsibility. In the present context this controversy will not be pursued. It suffices to note that on some occasions international tribunals have recognized contract claims as constitutive of responsibility in the case of non-performance by a Respondent

¹ *The Carthage*, *ibid.*, vol. 11, p. 449; *The Manouba*, *ibid.*, p. 463.

² *The Canadienne* claim, *ibid.*, vol. 6, p. 29; *The Sidra* claim, *ibid.*, p. 53; *The Daylight* claim, *ibid.*, vol. 4, p. 164.

³ *Supra* (previous note), at p. 170; the entire opinion is of interest. See also the *Newchwang* claim, *Reports of International Arbitral Awards*, vol. 6, p. 64.

⁴ *Union Bridge Company* claim, *ibid.*, p. 138 at pp. 141-2; *The Lottie May* incident, *ibid.*, vol. 15, p. 23. See further Schwarzenberger, *International Law*, vol. 2, (1968), pp. 582-91; and *Norwegian Shipowners* claims, *Reports of International Arbitral Awards*, vol. 1, p. 307.

⁵ *The Carthage*, *Reports of International Arbitral Awards*, vol. 11, p. 449; *The Manouba*, *ibid.*, p. 463.

⁶ See the references in Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 547-51.

Government.¹ A number of 'contract claims' have been treated as instances of confiscation or denial of justice.

27. *Failure to give appropriate protection to diplomatic and consular officials*

In the case of diplomatic² and consular³ officials the customary law has recognized a special duty of protection distinct from the usual standard applicable to aliens.

28. *Refusal to submit a dispute to arbitration: denial of justice*

In two Applications to the International Court of Justice a refusal to submit a dispute to arbitration in accordance with treaty obligations has been classified as a 'denial of justice':⁴ and it appears that the claim is separate from the breach of treaty as such. It would seem that a condition is that the reference to arbitration be 'the exclusive legal remedy'.

29. *Rights under municipal law: translated claims*

Under particular claims conventions municipal law claims may become justiciable in international tribunals. A particular occasion for such arrangements is the case in which an injury is inflicted by a State agency which is immune from suit.⁵

30. *Recent developments: unlawful discrimination*

To complete this account of types of 'causes of action' it is worthwhile looking at some recent developments of customary international law. One such development, which is now firmly established, is the principle of non-discrimination, which applies in matters of race and sex but no doubt also applies to a variety of arbitrary acts arising from religious and other social prejudices. The evidence for the view that the principle is a part of general international law is available elsewhere.⁶ In brief, the principle represents a contribution to the law arising from concepts of human rights.⁷ The relevance of the principle is considerable. Where

¹ Examples: *Illinois Central Railroad Co. claim*, *Reports of International Arbitral Awards*, vol. 4, p. 134; *Greenstreet claim*, *ibid.*, p. 462; *Kelley claim*, *ibid.*, p. 608; *Cook claim*, *ibid.*, p. 661; *El Triunfo*, *ibid.*, vol. 15, p. 467 at p. 477. See further Feller, *The Mexican Claims Commissions, 1923-1934* (1935), chapter 9; Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), pp. 77-84.

² *British Digest of International Law*, Part VII, vol. 7, pp. 712-16; *Borchgrave case*, *P.C.I.J.*, Series C, No. 83, p. 11 (Belgian Memorial) at pp. 23-9.

³ *Mallén claim*, *Reports of International Arbitral Awards*, vol. 4, p. 173; *Chapman claim*, *ibid.*, p. 632.

⁴ Application of Greece, *Ambatielos case*, *I.C.J. Reports*, 1952, p. 30; Application of the United Kingdom, *Anglo-Iranian Oil Co. case*, *ibid.*, p. 93. See also the *Ambatielos claim*, *Reports of International Arbitral Awards*, vol. 12, p. 83 at p. 95 (Memorial of the Greek Government); and the *Ambatielos case (Merits: Obligation to Arbitrate)*, *I.C.J. Reports*, 1953, p. 10 at p. 13 (United Kingdom submissions).

⁵ See Judge Jessup, separate opinion, *Barcelona Traction case (Second Phase)*, *I.C.J. Reports*, 1970, p. 3 at pp. 167-8 (para. 15).

⁶ References: Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 596-8.

⁷ See, for example, the *Belgian Linguistics case (Merits)*, European Court of Human Rights, Judgment of 23 July 1968, at pp. 34, 35, 89, 90.

a State acts within what is *prima facie* a right, power or privilege, but there is evidence that the precise occasion or mode of exercise of the right, etc., was based upon a selection contrary to the principle of non-discrimination, responsibility will arise on the ground of unlawful discrimination. Acts of expulsion, or taxation, for example, which would normally be lawful (it is assumed) would, in this case, constitute breaches of the principle of non-discrimination.

It is certain that the principle recorded above will overlap in practice and to a certain extent with the older principles involving abuse of rights¹ and denial of justice.²

IV. CONCEPTS AND DISTINCTIONS

In a rather abstract way the terms 'claim', 'cause of action' and 'subject-matter of the dispute' are interchangeable, although perhaps it would be more natural to reserve the terms 'claim' and 'cause of action' for cases involving issues of State responsibility. However, the problems are not really terminological and, in any case, many disputes do not involve questions of State responsibility: and this is normally the case when the issues concern title to territory or delimitation of maritime boundaries.

For practical purposes, and in the context of judicial proceedings, the subject-matter of the dispute is the product of the submissions of the parties, as interpreted by the tribunal, and this in the context of the relevant rules of international law and any relevant instrument such as a *compromis*. The experience indicates very clearly that international tribunals require definition and certainty in submissions, but this is not seen in terms of the selection of certain legal categories, provided that the particular illegal acts and omissions complained of are identified with sufficient particularity. Provided the acts asserted to be in breach of international law are specified clearly, the relevant rules of customary or treaty law may be invoked in the course of the pleadings (see Part III, sections 1-4). In certain classes of case involving the killing or wounding of persons, destruction of property and looting, the illegality may be asserted in general terms and the respondent State may have a burden of exculpation. In more complex cases the selection and specification of the heads of illegality may be of considerable significance as it was, for example, in the *Norwegian Loans*, *Interhandel* and *Barcelona Traction* cases.

The matter may be formulated in this way. Provided the tribunal can identify what it has to decide, the legal vehicles and categories are selected and offered by the parties at their own risk. Whilst the choice of legal category or even its specification in the Application are matters which do not receive formalistic treatment from tribunals, there are certain limitations. Thus in the *Fisheries*

¹ Section 12 above.

² Section 14 above. See further the Award of the Tribunal, *Norwegian Shipowners claims*, *Reports of International Arbitral Awards*, vol. 1, p. 307 at p. 339: 'The United States are responsible for having thus made a discriminating use of the power of eminent domain towards citizens of a friendly nation, and they are liable for the damaging action of their officials and agents towards these citizens of the Kingdom of Norway'; and see also the U.S. Note to the Norwegian Government, *ibid.*, p. 344.

Jurisdiction case (*Merits*) (*Federal Republic of Germany v. Iceland*) the International Court found fault with the 'abstract form' of one of the Applicant's submissions.¹ In particular, the Court was critical of the failure to specify all 'the acts of interference' by Icelandic patrol boats in respect of which compensation was sought.²

A particular constraint imposed by the International Court is the refusal to allow Applicant States to extend their original claims by amendment of the submissions. Amendment of submissions is a common practice and the distinction between permissible modification of a claim and the formulation of a different claim by amending submissions has led to differences of judicial opinion. In the *Temple* case (*Merits*) Cambodia in its final submissions had asked the Court to order restitution of sculptures and other objects removed from the Temple by the Thai authorities since 1954. The International Court considered this claim—which had not appeared in the Application—to be 'implicit in, and consequential on, the claim of sovereignty itself'.³ In a dissenting opinion in that case Judges Tanaka and Morelli expressed a different view and stated that the claim relating to the objects removed from the Temple was one 'having a completely different subject' from the claim of sovereignty.⁴ In the *Fisheries Jurisdiction* case (*Merits*) (*Federal Republic of Germany v. Iceland*) the Court set aside the Applicant's claim to compensation for alleged acts of harassment by Icelandic patrol boats but this refusal to accede to the request was not based on the view that the issue was outside the dispute over which the Court had jurisdiction. The Court expressed itself as follows:⁵

The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961.

It is obvious that the problem of innovative submissions is by no means procedural and that matters of substance are involved. This is true also of other issues arising from the way in which submissions are formulated. Thus in the *Nuclear Tests* cases the important joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, was much concerned to demonstrate that the essential character of the Australian claim was that of an action for a declaratory judgment and consequently it was impossible to reject the Applications on the ground that the cases had ceased to have any object in view of the French declaration of a cessation of atmospheric testing.⁶

The *Nuclear Tests* cases provide some significant discussion of the techniques by which the object and purpose of the claim may be ascertained. Both the Court

¹ *I.C.J. Reports*, 1974, p. 175 at pp. 203-4 (para. 74).

² *Ibid.*, pp. 203-5 (paras. 74-6).

³ *Ibid.*, 1962, p. 6 at p. 36.

⁴ *Ibid.*, p. 38.

⁵ *Ibid.*, 1974, p. 175 at p. 203 (para. 72). See also the separate opinion of Judge Waldock, *ibid.*, pp. 231-2.

⁶ *Australia v. France*, *I.C.J. Reports*, 1974, p. 253 at pp. 312-19.

itself¹ and the joint dissenting opinion² of four Judges accepted without question that this type of inquiry is of great value and that the nature of the claim did not depend exclusively upon the drafting of the text of the formal submission. The joint dissenting opinion differed radically from the Court in its actual assessment of the Applicant's true objective. In this general context, two distinct operations are involved. In the first place there is the obvious necessity for judicial interpretation of the formal submissions. Secondly, a tribunal may decide upon the more radical course and use the pleadings in general in order to determine the nature of the claim. It is apparent that this type of enquiry may lead to a judicial remoulding of the issues. In the context of the operation of the local remedies rule this may have occurred in the *Interhandel* case: see above Part II, section 5.

V. GENERAL OBSERVATIONS

There is no doubt that the study of causes of action is a matter of practical concern to governments involved in international litigation and their advisers. As such the material may be regarded as a specialized department of rules and techniques relating to the mixture of issues of procedure and substance which constitute broadly the presentation of the case. This way of seeing the material is too narrow. The material set forth in Parts III and IV has a significance for international law in general. Part III, in particular, provides a sort of manual of the most important rules of customary international law *as employed in the formulation of claims and issues*. The contents are worth perusal in a number of contexts. For example, it is sometimes said that the customary law is uncertain and nebulous. This is true of some parts of the law no doubt, but it is not generally true. The 'uncertainty' to be discerned usually derives from the fact that the rules involve standards and principles and require application: but, of course, these are attributes of the major principles of domestic law, not least in the context of tort (*la responsabilité civile*) and contract.

Nonetheless, the process of litigation, of the law in action and within a technical framework, does tend to reveal certain endemic problems in the definition and application of rules. One such problem is concerned with the extent to which a particular duty is conditioned by a requirement of *dolus* or intention, or may operate also in the context of objective responsibility. Another aspect of the same question is the determination of 'justifications' applicable to the breach of the particular duty. The learning on modification of submissions and on causes of action in general leads to other issues of substance. Which rules are actionable *per se*? Is a claim for compensation for breach of duty a claim distinct from that for a declaration of right? The Court in the *Fisheries Jurisdiction* case (*Federal Republic of Germany v. Iceland*) was certain that the answer was affirmative. However, a general issue arises from the role of particular forms of relief or reparation: when is a request for a specific form of relief merely ancillary and when does it involve a 'distinct' form of action? It may be noted that such problems are to be found in common law jurisdictions. Again, is it safe to assume that

¹ *Australia v. France*, *ibid.*, pp. 262-3.

² *Ibid.*, pp. 312-19.

an action for a declaration of rights is necessarily unalloyed by 'inherent' issues of State responsibility even if these are not actually pleaded? As in the *Nuclear Tests* cases, the action for a declaration (assuming that it was such in these cases) may involve substantial assertions of State responsibility, although no compensation is called for.

The subjects of inquiry rehearsed in the previous paragraph lead on to the statement of a more general scepticism. In considering issues of State responsibility, the relation between duties and forms of relief, the role of principles of causation or remoteness of damage, and the identification of 'justifications' (a matter of direct impact on the incidence of the burden of proof), is it really worthwhile to launch upon such consideration with the unargued premiss that the purpose must be the statement of *generally applicable* and *autonomous* sets of principles relating to 'State responsibility', 'justifications' and so on? Is it not the case that it is the nature and content of the *particular duty* which determines the quality of these other matters and, consequently, that a *general* apparatus is unhelpful and indeed a source of confusion? To take a simple illustration from the common law of tort: is it logical to assume that the 'foreseeability test' for remoteness of damage applies to all torts including the torts of intention such as fraud or intentional trespass to the person?¹

There is one further reflection which is prompted by the perusal of the various causes of action and the technique of 'restating' the law in terms of causes of action and litigated questions. The precise formulation of issues has much more than a 'tactical' or 'procedural' significance. There is a constant need to nourish standard types of illegality related principally to the concept of State responsibility and to that of invalidity. A major role of State responsibility and the law of claims is psychological and moral: that of putting a harder edge on legal rights and duties. It is to be admitted that all legal systems exhibit a variety of rules, principles and equities and that there is no Rubicon between law and morality. At the same time standards are diluted by the proliferation of unanchored and free-floating norms. In public international law examples of such more or less neutral norms are readily discovered. Reference may be made to the *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States*, a Memorandum prepared by the United Nations Secretariat in 1948.² The project did not have success³ but, if it had been adopted, even in treaty form, the text would have remained reticent about the legal consequences of the principles set forth. More recent examples probably include the Declaration on Principles of International Law concerning Friendly Relations adopted by the General Assembly in 1970⁴ and the Definition of Aggression adopted by the same body in 1974.⁵ It may be that the 'soft' and neutral character of certain sets of principles

¹ See the views of the Judicial Committee in *The Wagon Mound*, [1961] A.C. 388, at pp. 426-7. The Board appears to formulate a general principle, but there is room for doubt.

² International Law Commission, New York, 1948; A/CN.4/2, 15 December 1948.

³ See the Report of the International Law Commission, *Yearbook of the I.L.C.*, 1949, p. 277 at p. 286 (Part II); and see further Rosenne, this *Year Book*, 36 (1960), pp. 143, 153-4.

⁴ Res. 2625 (XXV); Brownlie, *Basic Documents in International Law* (2nd edn.), p. 32. Adopted without vote.

⁵ Res. 3314 (XXIX). Adopted without vote.

makes for greater pervasiveness and for easier propagation amongst politicians and diplomats. Another view would be that the proliferation of neutral principles, together with the low grade character of much writing on international law and the preferences of diplomacy for easy ways out, poses a serious threat to the status of rules of international law. It was said above that there is no Rubicon between law and morality: but those principles which achieve a legal status, as generally accepted by States, are presumably the more important rules. Rules and principles are to be given appropriate priority and, if more attention were paid to the legal consequences attached to rules and principles, a greater sense of order and of priorities would be introduced. It is perhaps odd that recent discussions of 'illegality' have all too often focused sharply upon *jus cogens* and have ignored the more general issue.¹

¹ For the issues and the literature see Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 509-16; the contents of footnote 1 at p. 509 may be compared with the numerous items in footnote 6 at p. 512.

THE STATE IMMUNITY ACT 1978*

By F. A. MANN†

ON 22 November 1978¹ the State Immunity Act 1978 came into force. Its purpose, according to its long title, is 'to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes'.

As the Act makes 'new provision', it is a remedial statute.² It initiates a new era in the field of sovereign immunity in English law, an era which will throw up problems of a new and different kind that have to be solved by way of statutory interpretation. The Act thus constitutes a break with the past. While the past may, but is unlikely to, have relevance for such purposes as, for instance, the identification of the mischief the Act intends to eliminate, and while the old law will retain its significance in connection with the immunity of international organizations to which the Act does not apply, in principle the new legislation must stand on its own feet. Certainly it will not always be easy to say where the Act intends to preserve and where it intends to break with the past. It will, therefore, be much easier to read it without regard to the history preceding it.³ On the other hand this supplies the material, the experience, the factual situations which are liable to arise and against which the new Act has to be tested.

In this particular case, however, earlier precedents may have another function of a more academic character. The present article can only mention, but cannot explore them. During the hundred years or so before 1978 or, to be more precise, before 1976, when the Judicial Committee of the Privy Council, and before 1977, when the Court of Appeal with a most remarkable judgment of Lord Denning M.R. (which will for ever remain a landmark of a quite unique kind) brought about a strong change of direction, the development of the law relating to sovereign immunity showed the common law or rather the principle of precedent at its worst. Its alleged flexibility had, in the field of sovereign immunity, given place to a most regrettable and, it is believed, avoidable ossification and positivism. The principle of precedent had become something in the nature of a cage of words. It precluded a consideration of modern conditions

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¹ S.I. 1978, No. 1572. By S.I. 1979, No. 458, operative since 2 May 1979, the Act was extended to overseas territories, particularly Hong Kong.

² See Craies, *Statute Law* (7th edn., 1971), p. 60.

³ See, generally, *Bank of England v. Vagliano*, [1891] A.C. 107, at p. 145 *per* Lord Herschell.

and of the realities of structural changes in world trade. It allegedly compelled the courts to heed a formula rather than the requirements of justice or sometimes even of logic. It did so unnecessarily, because international law is, or ought to be, treated as being different from municipal law and could have been so treated if the courts had had the strength of mind which comes from reflection rather than adherence to verbiage. An observer who for forty years has on many occasions tried to draw attention to the wrong turns taken by, and, indeed, the isolation of, English law and who has lived to see a brighter path to the future, may be forgiven if he emphasizes the great jurisprudential lesson which can be learned from a study of the case law relating to sovereign immunity before 1978. It covers a relatively small, self-contained field which invites analysis of the reasoning put forward by the courts, its strength, its unspoken motivation, its respect for the rule, its underlying idea, its true scope as opposed to the adherence to textual narrowness. The outcome of such an investigation, it must be feared, would by no means be a tribute to or evidence of the progressiveness and the imaginative foresight of the English judiciary of the twentieth century.

If, then, the earlier law is highly significant from the point of view of jurisprudence, but almost immaterial to the interpretation of the Act, it will suffice very shortly to survey the road leading up to it. The main effort can be directed to the explanation of the principle established by the Act and the ten exceptions to it; the latter are of varying importance in practice and frequently will not justify more than a few words. The final parts will have to devote some attention to a number of procedural matters, though care will have to be taken not to present too detailed and, therefore, somewhat uninviting a commentary upon the statute.

BACKGROUND

For almost a hundred years the law of sovereign immunity was dominated by the decision of the Court of Appeal in *The Parlement Belge*.¹ The action was one *in rem* against a mail packet running between Ostend and Dover, belonging to and being in the possession and control of the King of the Belgians and officered by officers of the Royal Belgian navy. Not surprisingly, in a judgment delivered by Brett L.J., the Court of Appeal held² that it lacked jurisdiction 'over the person of any sovereign . . . of any other State, or over the public property of any State which is destined to its public use' and that in an action *in rem* the owner of the ship was 'indirectly impleaded' in that 'the liability to compensation must be fixed not merely on the property but also on the owner through the property'. This was and has remained sound law. Nothing in the formulation of the decision went beyond the four corners of the case before the court or was required or permitted to be understood as a text of inflexible strictness comprehending many different sets of facts.

It was, however, in this sense that it was understood when forty years later the Court of Appeal, consisting of Bankes, Warrington and Scrutton L.JJ., had to decide *The Porto Alexandre*,³ another Admiralty action *in rem*. The ship,

¹ (1880) 5 P.D. 197.

² Pp. 214, 215, 217, 218.

³ [1920] P. 30.

either the property of or requisitioned by the Government of Portugal, carried a cargo of cork shavings to Liverpool under a bill of lading from which it appeared that the cargo was shipped by and consigned to a private company. The argument that the ship was engaged in 'an ordinary commercial undertaking as an ordinary trading vessel carrying goods for a private individual' was held not to be capable of displacing what was believed to be the rule laid down in *The Parlement Belge*. Such was the case which established the English rule of absolute immunity: the State as trader was no different from the State as sovereign.

Six years later, on 10 April 1926, there was signed in Brussels, by the United Kingdom among many other States, the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships; it was supplemented in 1934.¹ Its principal effect was to overturn the rule of absolute immunity as established by *The Porto Alexandre*.² But the United Kingdom failed to ratify it. The reasons have remained obscure and are not made clearer by the Interim Report on State immunities which an Inter-Departmental Committee headed by Sir Donald Somervell, then a Lord Justice, rendered in July 1951. It has not been published, but through the courtesy of the Lord Chancellor's Department this writer was allowed to see and use it. The Committee made the surprising statement³ that the 'Convention has not been ratified by His Majesty's Government, not, as we understand, because its principles were objected to but because difficulties arose with regard to the necessary legislation in Northern Ireland'. What these difficulties were and why they had to prevent ratification has not been explained. It was only on 3 July 1979 that the United Kingdom ratified the Convention, which entered into force for it six months later (Cmnd. 7800).

The doctrine of unrestricted immunity, introduced and applied without regard to developments abroad, continued to prevail in the United Kingdom with inexorable rigidity: *vide*, for instance, *The Cristina*,⁴ a case in which the Spanish Government of General Franco had, by force, used in implementing the decree of requisition, taken possession of a ship lying in Cardiff harbour. A high-water mark was reached by *Krajina v. The Tass Agency*.⁵ The plaintiff claimed damages for a libel contained in *The Soviet Monitor* which the defendants had published through their London office, this having been registered in the Register of Business Names set up under the Registration of Business Names Act 1916. Yet the Tass Agency was treated as a department of the Soviet Union and the plea of immunity was upheld. The decision led to some public disquiet and on 23 November 1949 a debate took place in the House of Lords⁶ in the course of which the Lord Chancellor, Earl Jowitt, acknowledged the existence of the grave problem 'whether the law of this country affords to organs of foreign States a wider immunity than is desirable or strictly required by the principles

¹ Cmd. 5672 and 5673.

³ Paragraph 13.

⁵ [1949] 2 All E.R. 274, noted *Modern Law Review*, 12 (1949), p. 494.

⁶ *Hansard*, H.L. Debs., vol. 165, col. 940.

² Above, p. 44 n. 3.

⁴ [1938] A.C. 485.

of international law observed in the countries of the world'. He announced the setting-up of an Inter-Departmental Committee to consider and report on the question. In due course Sir Donald Somervell was appointed Chairman and among the nine members were Sir Hersch Lauterpacht, Professor Hamson, Sir Eric Beckett, Sir Denis Dobson, Sir Kenneth Roberts-Wray and Sir Robert Speed. The Committee reported on 13 July 1951. It was only on 13 February 1953 that Mr. Nutting, then Under-Secretary of State for Foreign Affairs, announced in the House of Commons¹ that the Committee had found 'such great divergencies in state practice as to make it difficult to establish the exact position under international law'. He continued as follows:

In view of the differing opinions among the members of the Committee as to what principles it would be best to follow the Committee was unable to reach any final conclusions or make any final recommendations. Since it is clear that further study would not achieve any different result, it has been decided not to call upon the Committee for any further or final report and the Committee must now therefore be regarded as *functus officio*.

In fact it appears that all members reached 'the conclusion that the present law of the United Kingdom grants a greater immunity than is in fact granted by a large number of other States'.² But 'on the question as to what is required by international law we differ'.³ In particular the Committee did not find 'the *jure gestionis* principle capable of formulation'⁴ or, as they said in another place and as in the light of later developments is worthy of quotation in full,⁵

Although the principle of *jure gestionis* undoubtedly suggests the approach to the problem if there is to be a limitation, we are all agreed that regarded as a principle it presents great difficulties. It is not a principle which, even if justified by international law (and on this point, on our present information, we differ), could be incorporated into our law as a principle. Some countries have sought to apply such a principle in their municipal law and have encountered great difficulties. The raising of State loans, the purchase of arms, the purchase of the raw materials for arms or of other goods for the public services, of food necessary for the civilian population, all these might be regarded as acts done in the exercise of sovereign powers. If a change is to be made in the law as applied in this country it would not in our view be practicable simply to leave the courts to work out this principle.

The only positive suggestion which the Committee felt able to make was that there should be discussions with Commonwealth countries, with the United States of America and perhaps one or two other countries.⁶

After this singular failure of eminent men to reach anything approaching a measure of agreement or a constructive solution it took more than twenty years to find a stepping-stone leading to reform. While the courts of the United Kingdom, in one case in the face of a memorable dissent by Lord Denning,⁷

¹ *Hansard*, H.C. Debs., vol. 511, col. 81.

³ Paragraph 22.

⁴ Paragraph 26.

⁵ Paragraph 5.

² Paragraph 21.

⁶ Paragraph 7.

⁷ *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, noted *Modern Law Review*, 21 (1958), p. 165. Much later Lord Denning said about his opinion in that case: 'I took more pains about it than any other case in which I have taken part.' See the case mentioned in the following note at p. 1492.

adhered to their rule of absolute immunity with remarkable inflexibility and fervent faith in the rigidity of a formula,¹ the Council of Europe took up the subject and in 1972, after innumerable meetings in Strasbourg, produced its Convention on State Immunity which the United Kingdom signed.² Almost simultaneously the United States of America produced a Draft Bill,³ which on 21 October 1976 became the Foreign Sovereign Immunities Act 1976 and entered into force on 19 January 1977.⁴ Also in 1976 the Judicial Committee of the Privy Council, in an Admiralty action *in rem*,⁵ changed the law both of Hong Kong and of this country⁶ by denying immunity to a trading vessel of a foreign sovereign—a sensational development in light of the fact that on the one hand in an action *in rem* in which the defendant has appeared ‘the claim is against him personally’⁷ and on the other hand ‘it may fairly be said to be at the least unlikely’⁸ that the House of Lords would eliminate the ‘illogical result’ produced by distinguishing between actions *in rem* and actions *in personam*. The final point of judicial development occurred early in 1977, when Lord Denning M.R. and Shaw L.J., Stephenson L.J. dissenting, decided that even if the defendant Central Bank of Nigeria was a department of State it was not entitled to immunity in respect of a commercial transaction such as a letter of credit;⁹ an appeal to the House of Lords was compromised shortly before the date fixed for the hearing.

This, in summary, was the state of the law when the State Immunity Act 1978 passed through Parliament and became law on 20 July 1978. Most of its provisions do not have retrospective effect,¹⁰ yet it will only be on rare occasions that the old law will again have to be considered in the United Kingdom.

PERSONAL IMMUNITY

The principle established by the Act is the classical one: it is the foreign¹¹ State that is immune from the jurisdiction of the courts.¹² The Act does not speak of a sovereign State. On the existence of a State (and of many other international facts) the Secretary of State’s certificate is conclusive evidence;¹³ the question whether an unrecognized State is entitled to immunity will, therefore, not come up for judicial decision and it is quite possible that in a given

¹ The last case before the break was *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 1 W.L.R. 1485.

² Cmnd. 5081. The United Kingdom has not yet ratified the Convention, but it is understood that it will do so. Its substance, however, has been enacted in the State Immunity Act 1978. Absence of ratification would reduce the value of the Convention as a guide to construction. Yet, since it is referred to in the long title, it would in any case seem to be an admissible guide.

³ *International Legal Materials*, 15 (1976), p. 88.

⁴ *Ibid.*, p. 1388.

⁵ *The Philippine Admiral*, [1977] A.C. 373, noted *Law Quarterly Review*, 92 (1976), p. 166.

⁶ In this sense Robert Goff J. in *I Congreso del Partido*, [1978] 1 All E.R. 1169, at pp. 1184, 1185.

⁷ *The Cristina*, [1938] A.C. 485, at p. 492 *per* Lord Atkin, noted *Modern Law Review*, 2 (1938), p. 57.

⁸ See above, n. 6.

⁹ *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977] Q.B. 529.

¹⁰ S. 23 (3).

¹² S. 1.

¹¹ This includes a Commonwealth State: s. 14.

¹³ S. 21.

case the Secretary of State's certificate may, in effect, be able to answer that question in the affirmative and thus, contrary to traditional learning, withdraw a point of law from judicial decision—an unfortunate and, possibly, objectionable¹ result. The beneficiaries of immunity, however, comprise a number of defendants other than a State. Their definition invites a few comments.

1. The reference to a State includes, of course, its sovereign 'in his public capacity'² (who and whose family shall enjoy the benefit of the Diplomatic Privileges Act 1964³) as well as the government and its departments. No serious difficulties are likely to arise in respect of these defendants.

2. Immunity is also enjoyed by an *entity*, i.e. a body capable of suing and being sued, which is not distinct from, that is to say, is part of, the executive organs of the government.⁴ This is to be distinguished from a *separate entity*, i.e. a body capable of suing and being sued and distinct from the executive organs of the government; such an entity is immune only in certain circumstances to be considered later.

The Act, therefore, does not attach significance to the question whether under its own law the entity is a body corporate, a legal person, or not. It is possible that the entity meets the test of the prescribed procedural status, although it is not a body corporate in the English sense. The Act accepts the decision of a majority of the Court of Appeal⁵ according to which a legal entity is entitled to immunity if in substance it is a department of State. The frequently difficult question of whether or not a body is a corporate one has become irrelevant.

Whether the entity which is capable of suing and being sued is 'distinct from the executive organs of the government' is a question of fact and depends on foreign law, viz. the status which the foreign law confers upon the entity rather than the factual situation. If the entity is intended by the legislator to be distinct, then the fact that it acts in accordance with the directions of the government does not matter. Conversely, if the entity is not intended by the law to be distinct, its actual independence of government organs cannot deprive it of immunity.

It is distinctness from executive organs that matters. Accountability to Parliament or parliamentary organs such as a Public Accounts Committee is immaterial. And the distinctness, it is believed, must be of an organizational character in the sense that the test is provided by the existence of the right of executive organs to give directions about the conduct of the entity's daily business. Political independence is a different and irrelevant point: the entity may have to observe the general lines of the government's policy, yet be distinct from its executive organs. In practice it will probably be helpful to ask whether in substance the entity is a department of government or carries on its business independently, albeit in line with general government policy.

3. *Constituent territories of a federal State* have been dealt with somewhat

¹ If and in so far as the Foreign and Commonwealth Office purports to decide a question of law there may be a violation of Art. 6 of the European Convention on Human Rights.

² S. 14 (1) (a).

³ S. 20.

⁴ S. 14 (1).

⁵ *Baccus S.A. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438 (Jenkins and Parker L.JJ. Singleton L.J. dissenting), noted *Modern Law Review*, 20 (1957), p. 273.

oddly. As a rule they are treated as if they were a separate entity except that section 12 relating to service of process and judgments in default of appearance applies to them in any case. An Order in Council, however, may provide for other provisions to apply as they apply to a State.¹ This creates uncertainty and exposes a legal question to political influence and pressure, but in view of an unsatisfactory provision of the European Convention² the British legislator probably had to adopt some such solution.

A corporation which is 'part and parcel' or a department or an arm of the government of a constituent territory, such as the New Brunswick Development Corporation was found to be in relation to the Province of New Brunswick,³ is not specifically mentioned in the Act and would appear to be disentitled to immunity. Ex hypothesi it is not and cannot be an entity which is part of the central government and therefore covered by section 14 (1). And section 14 (5) and (6) as summarized above only refers to the immunity of the constituent territory itself (for instance, 'as if it were a separate entity'), but does not touch a separate entity or a corporation created by the constituent territory. Nor can such an entity be treated as if it were a department of the constituent territory's government. The wording is so clear that a body corporate which is separate and distinct cannot be put on the same level as its creator. Different reasoning was possible and was in fact adopted under the common law, but is not supported by the accepted canons of statutory interpretation. Nor is there any cause for regretting that such a body as the New Brunswick Development Corporation no longer enjoys immunity in this country. International law did not at any time confer such a privilege upon it.

EXCEPTIONS TO IMMUNITY

The Act includes ten provisions which create exceptions to the rule of immunity established by the first section. Many of them and certainly those which in practice are the most important ones are founded upon the existence of a 'commercial transaction' or of 'commercial purposes'. They adopt the distinction between acts *jure imperii* and acts *jure gestionis*, which in 1951 the Inter-Departmental Committee had rejected as unacceptable. What is more, to a large extent they refrain from a definition, but leave it to the courts to work out the distinction. In fact 'commercial purposes' is defined in section 17 (1) in somewhat circular terms, namely by reference to the definition of 'commercial transaction' in section 3. It is a field which has yielded a large harvest in foreign jurisdictions. Both the Brussels and the European Conventions as well as the recent legislation adopted by the United States of America⁴ have accepted exceptions based upon the commercial character of the activity. There can be no question of foreign legal developments being a source of law governing the interpretation of an English statute. Yet where the English statute intends to

¹ S. 14 (5).

² Article 28. See S.I. 1979, No. 457 relating to Austria's constituent territories.

³ *Mellenger v. New Brunswick Development Corporation*, [1971] 1 W.L.R. 604; cf. *Swiss-Israel Trade Bank v. Government of Salta*, [1972] 1 Lloyd's Rep. 497. On both cases see comment, *Modern Law Review*, 38 (1973), p. 18.

⁴ See above, p. 47 n. 3.

codify the law in a manner consistent with international law, comparative material will have persuasive authority of varying strength in construing terms that are now accepted to be common to most countries and expressive of the present state of public international law.

Another general point which requires emphasis is that it would be unjustifiable to subject sections 2 to 11 of the Act to a narrow construction on the ground that they contain exceptions to the principle laid down in section 1. The European Convention precluded any such argument by enumerating in Articles 1 to 14 the circumstances in which a State is not entitled to immunity and by providing in Article 15 for immunity 'if the proceedings do not fall within' the former group. In England it has frequently been a technique of statutory interpretation to say that an exception does not derogate from the principle to a greater extent than the words used strictly require, that, in other words, in case of doubt the principle rather than the exception should be held to apply.¹ But this is not invariably so and should certainly not be so in the present case. What the legislator described as exceptions represents a very broad sector of State activity. Its limits should be so drawn as to fit the legislative purpose behind each provision rather than the drafting technique that the legislator followed. The so-called exceptions are a far-reaching group of provisions which are not subordinate, but equal, to and on the same level as the so-called principle. Hence the rule usually applicable to the construction of exceptions does not fit.

The ten exceptions and their principal implications are as follows.

1. The State which 'has *submitted* to the jurisdiction of the courts of the United Kingdom' is disentitled to immunity. Submission may come about in four different ways.²

First, by a prior written agreement—an important change in the law of the United Kingdom. Whether there is an agreement and how it is to be construed will be a matter for the proper law of the contract.³ The Act states that submission of an agreement to English law is not tantamount to submission to English jurisdiction. On the other hand, if English law applies, a clause such as that authorizing an English solicitor to accept service of process ought to be treated as a submission. Whether the agreement is in writing is likely to be a matter for English law, which would have no difficulty in holding that the exchange of telex or cable messages or a written reference to an unsigned document such as the identifiable printed form of a contract constitutes sufficient writing. Whether a State which repudiates the agreement to submit remains subject to jurisdiction is likely to come up for judicial decision. It is submitted that the question should be answered in the affirmative.⁴

¹ Such suggestions have frequently been made. See, e.g., Cockburn, C.J. in *Sowerby v. Smith*, (1874) L.R. 9 C.P. 524, at p. 532, where he said that a certain provision 'being in derogation of the freehold given by the Act . . . must, I think, be construed most strictly'. ² S. 2.

³ This is the effect of the decision of the House of Lords in *Nova (Jersey) Knit Ltd. v. Kammgarnspinnerei*, [1977] 1 W.L.R. 713, where the agreement required by s. 1 (1) of the Arbitration Act 1975 was considered to be subject to German law.

⁴ The analogy of such cases as *Heyman v. Darwins*, [1942] A.C. 356 and of the established practice of the International Court of Justice (see, e.g., *Fisheries Jurisdiction case (United Kingdom v. Iceland)*, I.C.J. Reports, 1973, p. 3) may prove helpful.

Secondly, submission may occur 'after the dispute giving rise to the proceedings has arisen'. Here no formality would seem to be required. Once there is a dispute (and it may not always be easy to define its beginning) even an oral statement accepting jurisdiction will be sufficient; a submission in proceedings actually pending does not seem to be required.

If the State 'has intervened or taken any step in the proceedings' then it is 'deemed to have submitted'; this is the third method. If one accepts the law relating to the Arbitration Act 1950, an unconditional appearance will not be regarded as a step in the proceedings,¹ nor will the claim to immunity be so regarded, as the Act expressly states.

The fourth case is the obvious one in which the State itself has instituted the proceedings. In such event the State is exposed to a counter-claim which 'arises out of the same legal relationship or facts as the claim'. It is not necessary that a court in the United Kingdom has (local) jurisdiction in respect of the cross-claim made by the defendant. It is possible, therefore, that the defendant may pursue a claim which he could not pursue by a writ.

2. The second exception will in practice be the most important one. According to section 3 the State does not enjoy immunity 'as respects proceedings relating to (a) a *commercial transaction* entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom', provided that the latter rule does not apply 'if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law'.

The rule laid down by sub-paragraph (b) will be readily understood. It is likely to cover many cases. The legal problem which primarily causes difficulty is whether the requirement of total or partial performance in the United Kingdom is to be determined by English law or by the proper law of the contract which, so it must be assumed, is intended by the legislator to govern the existence as well as the construction of the contract, though not its commercial character. The difficulty thus alluded to has arisen in many contexts and is a famous one in the conflict of laws;² it led only recently to a decision of the European Court of Justice.³ It is suggested, though with much hesitation, that it would be so artificial to subject the construction of the contract and the determination of the place of performance to different legal systems that there will be no alternative but to allow the proper law to prevail in both respects.

Nor will sub-paragraph (a) cause much difficulty in the majority of cases, for the Act defines 'commercial transaction' in the widest terms so as to comprise all contracts (except contracts of employment) and any other transaction into which a State enters 'otherwise than in the exercise of sovereign authority'.

In effect, therefore, not only concession agreements but practically every other type of contract will be within the exception, including those contracts which

¹ S. 4.

² Cf. Mann, *The Legal Aspect of Money* (3rd edn., 1971), pp. 206-8.

³ *Établissements A. de Bloos v. Établissements Bouyer S.A.*, [1977] 1 C.M.L.R. 60.

have given trouble to tribunals as well as scholars. The legislator has decided in favour of the objective test of the nature of the transaction and completely disagreed with the Inter-Departmental Committee which in 1951 thought¹ that the principle of *jure gestionis* (now adopted as an exception) was not one 'which, even if justified by international law . . . could be incorporated into our law as a principle'. The Act of 1978 has provided a definition and made it quite clear that all the contracts which in 1951 were apparently thought to be acts done *jure imperii* are commercial transactions. Government loans, shoes for the army, warships, guns, aeroplanes—all these are the subject-matter of commercial transactions in respect of which immunity cannot be claimed. As mentioned above, even a mining concession agreement, though not a contract within the category of contracts mentioned in (b), would be a commercial transaction, because it would be 'any other transaction . . . into which a State enters', unless 'the parties to the dispute are States or have otherwise agreed in writing'. A substantial limitation, however, is due to the fact that before immunity or its absence falls to be considered an English court must have (territorial) jurisdiction, and this will frequently be a serious hurdle for the plaintiff. A very important point must be emphasized: the denial of immunity is independent of the nature of the act from which the claim arises. If the transaction or activity into which a State enters or in which it engages is a commercial one, the State is disentitled to immunity even in cases in which, for instance, the breach of contract arises from an act done in the exercise of sovereign authority. All that matters is the character of the transaction or activity carried on by the State as opposed to the facts on which the claim or the defence is founded.² These facts may even constitute an act of State. As the law stands, its validity probably may not be questioned for reasons which have nothing to do with the Act of 1978, but if the court is concerned only with its effects upon what is a commercial transaction it is not precluded from considering them either by the rule of immunity or by the alleged sacrosanctity of the act of State.³

The puzzling feature of section 3 lies in the fact that, according to the definition, the term 'commercial transaction' includes 'any . . . activity . . . in which [the State] engages otherwise than in the exercise of sovereign authority'. The State is not immune 'as respects proceedings relating to' such an activity. It is submitted that the definition is such as to render it possible to sue a foreign State in respect of a tort other than those mentioned in sections 5 to 7 which has been committed in England, such a tort providing the court with (territorial) jurisdiction according to Order 11 rule 1 (h) of the Rules of Supreme Court. In this somewhat unexpected manner torts do come within the scope of the Act in such a case as *Krajina v. The Tass Agency*,⁴

¹ Paragraph 5.

² The decision of Robert Goff J. in *I Congreso del Partido* (above, p. 47 n. 6) on this point (see pp. 1183, 1184) could not even under the old law easily be supported. It is certainly contrary to the construction which the Act requires.

³ Cf. the decision of the Court of Appeal in *Buttes Gas & Oil Co. v. Hammer*, [1975] Q.B. 557.

⁴ Above, p. 45 n. 5.

but also in other cases involving, for instance, claims for damages for fraud or conspiracy. The same applies to cases in which confidential information has been imparted to a foreign State, but misused by it or its agent—a by no means inconceivable situation. The only activity which cannot in any circumstances be a commercial transaction is one exercised by virtue of sovereign authority—a phrase which, it is submitted, only qualifies the word ‘activity’, not the words ‘any other transaction’. The term will have to be construed according to English law.¹ In other words the classification of facts alleged to satisfy a conception used by the English legislator must be provided by English law, however alien to English notions they may be. Even if by Soviet law the publication of *The Soviet Monitor* is an act of sovereign authority, this is unlikely to be so under English law.² According to the Report of the Inter-Departmental Committee, in 1951 an Italian court decided that the publication in Italy by a Brazilian state of a magazine strictly for the purpose of encouraging immigration to Brazil was not an act done *jure imperii* in respect of which Brazil was entitled to immunity.³ An English court ought to hold similarly that the publication of such a paper is not an act done in the exercise of sovereign authority. It would be different, for instance, if a foreign State were to send a diplomatic note to the Foreign and Commonwealth Office; a libel contained in it could not be pursued by proceedings here if the defendant State raised the plea of immunity. The argument here put forward and based on the words ‘proceedings relating to . . . any . . . activity . . . in which [the State] engages otherwise than in the exercise of sovereign authority’ cannot be met by a reference to sections 5 to 7, which deal with certain torts committed in England. Section 3 comprises torts wherever committed, provided the English court has (territorial) jurisdiction in respect of the claim or counter-claim. A tort committed abroad may yet have been committed in England if the damage has occurred here. Furthermore, the fact that certain torts are specifically mentioned does not necessitate the conclusion that other torts are not caught by the wide terms of section 3.

It must be made clear, however, that an activity may be in the exercise of sovereign authority even if it is unlawful. Property taken by force may be taken by way of sovereign authority.

The width of the exception allowed by section 3 is likely to be fully recognized only in years to come in the light of experience which practice will bring forth and which at this stage it is hard to perceive and foresee.

¹ The Head of New Scotland Yard who upon request sends a report on the Church of Scientology of California to the Federal Republic of Germany’s Federal Criminal Office acts in exercise of sovereign authority and is immune in Germany: German Federal Supreme Court, 26 September 1978, *Neue Juristische Wochenschrift*, 1979, p. 1101.

² In *Yessenin-Volpin v. Novosti Press Agency, Tass Agency and the Daily World*, 443 F. Sup. 849 (1978), also *International Legal Materials*, 17 (1978), p. 720, a United States District Court decided that, although by publishing newspapers the defendants engaged in commercial activity, a libel published in the newspaper was not ‘in connection with a commercial activity’, for the newspapers were committing ‘acts of inter-governmental co-operation’. The decision should not be followed for this reason, among others: that it classifies the terms of a U.S. statute according to Soviet law and practice.

³ Paragraph 18.

3. The third exception relates to a *contract of employment* between the foreign State and an individual who is (only) a national of the United Kingdom or habitually resident there, provided that either the contract was made or the work is to be wholly or partly performed here (section 4). It is open to the parties to agree otherwise in writing, and if the employment is for work in an office, agency or establishment maintained in the United Kingdom the State cannot claim immunity except if, at the time when the contract was made, the individual was habitually resident in that State.

Once again the question whether a contract was made and what its terms are must be decided by the proper law. But whether it constitutes a contract of employment, i.e. a contract of service rather than a contract for services, whether it was made in the United Kingdom or where the individual's habitual residence was—these are questions governed by English law. The question where a contract is made is, as one knows only too well, a particularly difficult one and it is at first sight not easy to understand why existence or absence of immunity should be dependent upon the place where the letter of acceptance is posted. Immunity and acceptance of an offer are so different in character that to make the former subject to the latter is a little incongruous.

The section is a narrow one and may support results which will not necessarily appear justifiable. If Nigeria makes in London a contract which is governed by English law and by which a citizen and resident of the United States of America agrees to serve on an oil rig on the high seas it would appear that the employer is entitled to immunity in an English court the (territorial) jurisdiction of which may follow from Order 11.

4. The next exception applies to the case in which the foreign State causes in the United Kingdom *injury to a person or to property*: section 5. The provision and its application are fairly obvious and will only in the most exceptional cases give rise to any problem of construction. One such problem is due to the fact that the section requires the damage to or loss of property to have been caused by an act or omission in the United Kingdom, but does not require the property to be situate there. Suppose a London merchant deposits goods in a warehouse in State X on the understanding that they will be released to him or his order upon production of an authority signed by the merchant and countersigned by the Trade Delegation of X in London. The Trade Delegation is contractually bound, but refuses to countersign. The loss of the goods is said to be caused by the failure of the Trade Delegation to act in London. It would seem that in such circumstances State X is not entitled to immunity in an action for damages.

5. The fifth exception, established by section 6, is in certain respects particularly interesting. Sub-sections 1 to 3 deprive the foreign State of immunity in regard to *immovable property* in the United Kingdom, any interest of the State in property of whatever kind and wherever situate if it arises by way of succession, gift or *bona vacantia*, or any interest in an *estate* of deceased persons, insolvent persons and others and in a trust. In the vast majority of cases the property or the estate will be in the United Kingdom. In such a case the exception is plainly justified and necessary and largely supported by earlier law.

In some cases the exception would also seem to apply if the property or estate or trust is situate abroad, but they cannot often occur in an English court.

While the cases thus alluded to may seem fairly clear and even familiar, there is buried among them one particular set of facts which, one may be sure, the legislator did not contemplate but which, it is submitted, may be covered by them. It unfortunately happens quite frequently that States cause the dissolution of corporations and take over their assets and liabilities, sometimes for purposes of a confiscatory character, and that such measures are believed to protect the corporation and its property from the jurisdiction of foreign courts or arbitrators. These are instances of a universal succession and should in future come within the ambit of section 6 (2), so that the State can be made personally liable in respect of the 'deceased' corporation's contracts. Such proceedings would appear to relate 'to any interest of the State in movable or immovable property, being an interest arising by way of succession . . .'. These are words which do not need to be limited to proprietary interests, but may be said to comprise liabilities for the discharge of which the property is, in a loose sense, a security.¹ Even where the State takes only the assets of the dissolved corporation and purports to leave its liabilities unprovided for, *ordre public* would require it to be held liable and for the reasons given it should not be entitled to immunity.²

Sub-section 4 reads as follows:

A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property

- (a) which is in the possession or control of a State; or
- (b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it, or in a case within paragraph (b) above, if the claim is neither admitted nor supported by *prima facie* evidence.

If one ignores ships, which are separately dealt with in the Act, this is the case of the Bank of England with which the State has deposited gold³ or of Sotheby's who hold a painting sent to them by the State for sale. If proceedings are brought against the Bank of England or Sotheby's by a plaintiff who claims to be the owner or entitled to immediate possession, no Continental court, so it appears, would ever have thought of immunity coming into play, because this is conceived as a personal privilege of the defendant who, if he holds property for a State and cannot bring it before the court by interpleader proceedings, must

¹ Cf. the French principle of the *patrimoine* of which Carbonnier, *Droit Civil*, vol. 3 section 2, has said: 'c'est la caractéristique de la succession au patrimoine (in universum jus) . . . que d'être, tout à la fois et indivisiblement, succession à l'actif et au passif', and he quotes the maxim: *bona non sunt nisi deducto aere alieno*.

It is believed that, for the reasons given in the text, *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 1 W.L.R. 1485, should today be decided differently. On universal succession generally see *Metliss v. National Bank of Greece*, [1958] A.C. 509, and *Adams v. National Bank of Greece*, [1961] A.C. 255.

² On *ordre public* in case of universal succession see *Metliss'* case, in the Court of Appeal, [1957] 2 Q.B. 33, at p. 48 *per* Romer L.J.; and *Adams'* case, *ubi supra*, at p. 289 *per* Lord Denning.

³ *United States of America v. Dollfus Mieg & Cie.*, [1952] A.C. 582.

make his own arrangements with it, but cannot confront the plaintiff with the immunity of the third party. In this country, however, the unfortunate idea grew up and was repeatedly sanctioned by the House of Lords¹ that indirect possession or control by a State involved its 'indirect impleading' and entitled the defendant actually in possession to immunity. This, one notices with satisfaction, has been abolished in the sense that the defendant can only claim it if the State in an action against it directly could do so. One is thus directed to look again at section 3 and finds that the outcome depends on whether the proceedings relate to any transaction or activity into which the State has entered or in which it has engaged otherwise than in the exercise of sovereign authority. It would seem, therefore, that in the circumstances of the *Dollfus Mieg & Cie.* case the plaintiff could not today succeed, because the State which had deposited the gold with the Bank of England had done so and, indeed, had obtained the gold in the exercise of sovereign authority, so that an action against the States which were the bailors would be stayed. If, on the other hand, the plaintiff has purchased identifiable gold bars from the State which has deposited them with the Bank of England but refuses to release them he is entitled to succeed in regard to any plea of immunity. Property which has been confiscated without compensation or, indeed, which has been taken without colour of legality cannot be recovered from the State. Accordingly it cannot be recovered from the defendant in England who is in possession of it. *Rahimtoola v. Nizam of Hyderabad*² is now a more doubtful case. Lord Denning, whose approach is much to be preferred to that of his colleagues, put forward the attractive and, indeed, convincing thought that the facts pointed to 'an international transaction' or, as Upjohn J. had said in the court of first instance, an 'intergovernmental transaction' between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, a 'transaction more in the nature of a treaty than a contract or trust'.³ On this basis the court had to deal with a transaction entered into in the exercise of sovereign authority, with the result that Pakistan or its agent, the defendant, could claim immunity and so could the Westminster Bank if the debt due from it could be said to be property in the possession or control of Pakistan or in which Pakistan claimed an interest. This condition, probably, was under the old law and would now be fulfilled, though, as Lord Denning pointed out, it remains very difficult to understand (and none of the other Law Lords satisfactorily explained) why in the *Dollfus Mieg* case the claim for damages in respect of the converted thirteen gold bars was allowed to proceed, while the debt due from Westminster Bank to the Nizam of Hyderabad as beneficial owner could not be pursued. The conclusion is not entirely fortunate: two of the most regrettable decisions of the House of Lords in the field of sovereign immunity would appear to have been sanctioned by the legislator who at the same time has done nothing to eliminate the logical inconsistency between them.

The sub-section, it will be noted, makes a curious distinction between property which is in the possession or control of a State and property in which

¹ For the first time in *The Cristina*, above, p. 47 n. 7.

² Above, p. 46 n. 7.

³ Pp. 422, 423.

a State claims an interest. In the former case the State will have to prove that it is in possession or control, but in the latter case the claim to immunity, unless admitted, will succeed if it is supported 'by prima facie evidence'. Two things have to be said about this provision. The claim to an interest in property as a basis for immunity seems to originate with Lord Wright who used the phrase in *The Cristina*,¹ when he spoke of interests 'lesser than a proprietary interest or even than a possessory interest'. But he probably treated them merely as an illustration of control,² while the section under discussion draws a sharp distinction. It is a serious question whether in a statutory text an imprecise phrase used in a judicial opinion should not be given a strict meaning. If so, 'an interest' could only denote an equitable interest as understood by the general law of England. However this may be, the effect is that from the State's point of view it may be more advantageous to allege 'an interest' rather than 'possession or control'. Moreover, the idea that prima facie evidence is sufficient and strict proof is not required, though it comes from an Admiralty case,³ used to have universal validity. It is now clearly confined to the single case of a claim to 'an interest' in property other than ships.

6. Exception 6 relates to industrial property rights in the United Kingdom. No immunity exists where the proceedings relate to any such right belonging to the foreign State and protected in the United Kingdom or to the infringement by the State of any such right belonging to someone else or to passing-off in the United Kingdom: section 7.

These provisions, the statutory definition of which is much more detailed and precise, are unlikely to prove troublesome and do not require comment at this stage.

7. Similar remarks apply to the seventh exception. A State which is a member of a corporate or unincorporated body and involved in proceedings brought by such body or its other members cannot claim immunity: section 8. The only point which deserves emphasis is that the section applies not only to bodies created in the United Kingdom, but also to such body as 'is controlled from or has its principal place of business in the United Kingdom'. In some very special circumstances it may be possible to bring an action here against a foreign State as a member of a corporation which is formed under such State's own law, but controlled from the United Kingdom.

8. The eighth exception is designed to overturn a most unfortunate and at the same time wholly avoidable decision of the House of Lords.⁴ Where a State has agreed to arbitration, it is without immunity 'as respects proceedings in the courts of the United Kingdom which relate to the arbitration': section 9.

¹ Above, p. 47 n. 7, at p. 507.

² This is how he was understood by Earl Jowitt in the *Dollfus Mieg & Cie.* case (above, p. 55 n. 3), at p. 604.

³ *Juan Ysmael & Co. Inc. v. Indonesian Government*, [1955] A.C. 72, noted *Modern Law Review*, 18 (1955), p. 184.

⁴ *Duff Development Co. v. Kelantan*, [1924] A.C. 797, on which see Cohn, this *Year Book*, 34 (1958), p. 260, and Mann, this *Year Book*, 42 (1967), p. 17, also *Studies in International Law* (1973), p. 276.

It will be noted that the section is not limited to arbitration in the United Kingdom. English awards made against a foreign State can be turned into judgments of an English court (though this should rarely be necessary or useful) and a foreign award can be made enforceable here, though not enforced except as mentioned below. The section also gives jurisdiction to the court to make interlocutory orders for the security of costs, discovery, etc., such as are provided for in the Arbitration Act 1950.

9. Exception 9 is of great practical importance in that it excludes immunity in respect of *ships* used or intended to be used for 'commercial purposes': section 10. The principle as expressed in sub-section 2 extends to cargo and other property belonging to or in the possession or control of the State or in which it claims an interest (sub-sections 4 and 5). But the whole section is applicable only in Admiralty proceedings or in proceedings on a claim which could be brought in Admiralty (sub-section 1); in such proceedings sections 3 to 5, that is to say, exceptions two, three and four discussed above, do not apply if the defendant State is a party to the Brussels Convention, for the Act does not intend to interfere with the latter as a self-contained code.

The main point to be made in connection with section 10 arises from the term 'commercial purposes' which occurs in many sections and which in the present context has very special significance. It is to be contrasted with 'commercial transaction' in section 3 which is determined by its objective nature rather than its possibly subjective purpose, in the same way as the American Foreign Sovereign Immunities Act 1976 which takes 'commercial activity' as a test and defines it 'by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose'.

The starting point would seem to be clear: the meaning of 'commercial purposes' should be construed according to English notions. The plaintiff has to prove the facts, but it is for English law to say whether they establish 'commercial purposes' in the English sense.

In answering this question it will be necessary to distinguish clearly between ship and cargo.

As regards a ship the State is disentitled to immunity if the ship belongs to it (in the wide sense referred to above) and is used or intended to be used for commercial purposes. Cargo does not enjoy immunity if the cargo belongs (again in the extended sense mentioned above) to the State and both the cargo and the ship are used or intended to be used for commercial purposes. The last-mentioned two words, therefore, are crucial. A warship which happens to be used for carrying motor cars for civilian use cannot be immune, but if a trading ship carries ammunition for military purposes both the ship and the cargo are immune, at least if there is no commercial cargo on board. Cement carried in a trading ship may be immune: the result depends on the purpose for which it will be used. If the consignee intends to sell the cement to the military administration, but is not contractually bound to do so, the non-commercial purpose does not in a legally relevant sense exist. If the consignee has sold an identifiable quantity being part of the cargo of cement for the building of military barracks,

immunity extends to such quantity and it would probably be no counter-argument that one must not look beyond the consignee; what matter are the ultimate purposes in so far as they can be proven. Shoes for the army (to revert to an often-discussed example) are cargo for a non-commercial purpose, but if they are consigned to a private merchant who only hopes to sell them to the army, the purpose remains commercial. If the consignee is the State itself and intends to use the cargo for the business of a State monopoly such as a tobacco or alcohol monopoly, this is a commercial purpose, though the consignee may regard it as a public purpose. Conversely, if there exists in England a monopoly for the production and sale of certain goods (as at present is not the case) this would not prove that similar goods carried in a foreign ship are not intended for commercial purposes: a State monopoly as such is not by any means a non-commercial venture.

10. The last exception (section 11) does not require more than mention, for it is unlikely to fall often for consideration. No immunity can be claimed by a defendant State in proceedings brought to recover value added tax, customs duty or any agricultural levy or rates in respect of premises occupied for commercial purposes.

THE SCOPE OF IMMUNITY

Immunity does not only mean the exemption of a foreign State from British jurisdiction, but also entails other procedural privileges.

Thus by section 12 service of proceedings and time limits for appearance are subject to special rules, but these do not apply if the State has agreed to service in another manner. From a practical point of view it is, therefore, very important to ensure that a foreign State which submits to the jurisdiction of English courts or to arbitration in England also agrees to service upon an agent in this country who is irrevocably authorized to accept service and to enter an appearance.

Further consequences of immunity relate to discovery (section 13, sub-section 1). The failure of a State to afford discovery shall not attract any penalty by way of committal or fine. This, clearly, is a necessary provision, but it is also a harmless one, for it does not in any way preclude the court from drawing the appropriate conclusions from the State's failure to comply with rules of procedure to which, *ex hypothesi*, it has submitted. A robust judge should not feel diffident in such a case, particularly if he remembers that the failure of a State to afford discovery may have to be treated as involving State responsibility.¹

Next, except with the consent of the State (which it is difficult to imagine will ever be given) the English court is precluded from granting an injunction or making an order for specific performance or for the recovery of property against it: section 13, sub-section 2 (a). This is a most serious and, indeed, worrying aspect, for like the rest of section 13 it seems to apply even in cases in which the State is not entitled to immunity and in which, therefore, proceedings of all

¹ Cf. the Award in the Arbitration between the United Kingdom and Greece in the *Ambatielos* claim (1956).

kinds and with all types of relief should be available against it. In recent years the *Mareva* type of injunction¹ has become an important feature of commercial practice in England. To deny it against a State which is subject to English jurisdiction will frequently render proceedings nugatory and deprive a successful plaintiff of the fruits of his victory. One only has to look at *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*.² There Mocatta J. had granted an injunction blocking some \$14 million which stood to the credit of the defendant, the Central Bank of Nigeria, in the books of the Midland Bank. The Court of Appeal, on this point unanimously, held that the injunction was to be continued, for 'if the Central Bank of Nigeria is entitled to immunity from being sued, so also can the funds be immune from being seized. Otherwise not.'³ This sound law has been changed, with the result that in most cases proceedings in England against a foreign State may prove pointless even if the defendant is not entitled to immunity and the action succeeds.

This is to be contrasted with the further provision in section 13, sub-section 2 (b) according to which the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or for the arrest, detention or sale of a ship or other property, unless the exception in sub-section 4 applies, i.e. the property is for the time being in use or intended for use for commercial purposes. The latter exception is in line with a remarkable decision of the Federal Constitutional Court of Germany which in an elaborately and closely reasoned judgment held that a foreign State's German property was available for the enforcement of a judgment if it had a commercial character.⁴ In these circumstances the total denial of injunctive relief becomes even more mysterious and regrettable.

The scope of immunity is subject to some additional provisions of a very special kind, which apply to *separate entities and central banks*, and need some analysis.

1. By virtue of section 14, sub-section 2 a separate entity (which, it will be remembered, is an entity capable of suing and being sued, but distinct from the

¹ *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Reports 509.

² Above, p. 47 n. 9. The new English law should be contrasted with the law of Switzerland as declared by a recent decision of the Federal Tribunal (15 November 1978, BGE 104 Ia 367): The Zurich branch of Lloyds Bank International granted a 'time deposit' to a Turkish commercial bank in such a manner as to 'interpose' the Turkish Central Bank in its capacity as guardian of Turkish Exchange Control. When the commercial bank failed to repay, the lender's assignee obtained an attachment of the Central Bank's Swiss assets. The appeal failed, for the Federal Tribunal held that the nature of the legal relationship with the borrower was commercial in character and that 'mere payment regulations' requiring the interposition of the Central Bank could not affect it. Accordingly the Central Bank, if liable at all, was not entitled to immunity. The question of liability was left to be decided in the main proceedings. It is possible that this decision is contrary to two decisions of the highest French court on the immunity of a Central Bank in matters of exchange control: Cass. Civ., 3 November 1952, *Revue critique de droit international privé*, 1952, p. 425, with note by Freyria, or *Clunet*, 1953, p. 654, with note by Goldman; 19 May 1976, *Revue critique de droit international privé*, 1977, p. 359, with note by Batiffol.

³ At p. 561.

⁴ Federal Constitutional Court, 13 December 1977, *Neue Juristische Wochenschrift*, 1978, p. 485.

executive organs of government) is immune only if 'the proceedings relate to anything done by it in the exercise of sovereign authority' and the circumstances are such that the State would have been immune. The difficulty arises from the former requirement. When can it be said that a separate entity does something in the exercise of sovereign authority? It is an essential element of the definition that the entity is distinct from the executive organs of government. Hence 'the exercise of sovereign authority' cannot be the same thing as governmental authority. In fact it is difficult to think of, or to find in the judicial practice of the past the example of, a body distinct from the executive organs of government, yet exercising sovereign, i.e. supreme, authority. An Immigration Board or the Civil Aviation Authority may qualify, but are unlikely to be sued in a foreign country. A body such as the National Coal Board in Britain does not exercise sovereign authority in respect of coal. Or the British National Oil Corporation as at present constituted certainly exercises far-reaching authority over oil. But can it be suggested that its authority is sovereign? Even if something in the nature of governmental authority were sufficient, this is vested in the Minister of Energy. It would seem, therefore, that it can only be in rare circumstances that a separate entity will be entitled to immunity. This is particularly so in light of the fact that the phrase 'in the exercise of sovereign authority' should be construed according to English law and foreign constitutional law should be immaterial, though, of course, the foreign facts will have to be ascertained in order to answer the question whether they involve the exercise of sovereign authority in the English sense.

2. If a separate entity other than a central bank is entitled to immunity, but submits to the jurisdiction then, according to section 14 (3), the provisions of section 13, sub-sections 1 to 4 shall apply; in particular, no injunction can be granted nor can any judgment be enforced against the separate entity. When does, in the present context, a submission to jurisdiction occur? Is such submission limited to the entry of an unconditional appearance? Or is the term to be understood in the wide sense of section 2 so as to extend to an agreement to submit or to the institution of proceedings by the separate entity? It is suggested that section 2 should apply on the ground that within the field covered by the Act submission is intended to have a special meaning which is wider than and different from the usual one.

3. Where the separate entity is a central bank section 14 (4) introduces special provisions. It renders section 13, sub-sections (1) to (3) applicable, so that no penalty for defective discovery can be imposed, no order for an injunction or for specific performance can be made and a judgment cannot be enforced. And, irrespective of whether or not the central bank is a separate entity, the last-mentioned consequence is fortified by the express provision that even the bank's property used or intended to be used for commercial purposes is unavailable for execution.

The legislator has thus set aside one of the most important results of the judgment of the Court of Appeal in the *Trendtex* case and rendered proceedings against a central bank almost wholly illusory, notwithstanding the fact that by

virtue of section 14 (2) a central bank which is a separate entity will be subject to jurisdiction as such in cases in which the proceedings relate to matters of a commercial character and the State itself would not be immune. The mercenary attitude towards central banks, although shared by the United States (see section 1611 of its Act of 1976), remains a matter for great regret. It is no doubt due to the wish to attract foreign funds to the City of London by assuring their owners that they have nothing to fear from their creditors. Is it in the true interest of Britain and the City of London to assist foreign States or their central banks in avoiding the discharge of their commercial debts? If in the *Trendtex* case the action and, in particular, the application for an injunction had failed this country would have bought popularity in Nigeria with a loss of reputation in the rest of the civilized world which does not confer similar privileges on central banks. Would so cynical an attitude commend itself? Does principle and financial and commercial probity no longer count? The legislator's policy towards central banks merits and requires urgent review.

CONCLUSION

In conclusion it can be stated that the Act of 1978 is better drafted than many other recent enactments. It creates some uncertainties. It also allows much greater scope to the principle of immunity than the state of the law in the world at large necessitates, but in this respect gives expression to a specific legislative policy which is designed to protect this country's alleged financial interests. Two problems, in particular, pervade the whole of the Act. The first involves the question of classification. This, it has been suggested, should almost everywhere be solved in the light of English conceptions, the foreign law being relevant only in so far as the explanation of the factual background is concerned. The second relates to the proof of the relevant facts. It is submitted that, throughout, the State claiming immunity has to prove the facts on which it relies. There is only one exception, in section 6 (4), where it is expressly provided that in the event of the State claiming an interest in property the subject-matter of proceedings against a third party it is sufficient for the claim to immunity to be 'supported by prima facie evidence'. The very fact that the legislator thought it right to express this single exception makes it clear that in all other cases the facts have to be fully proved by appropriate evidence. The burden of proof, it would seem, is throughout on the State claiming immunity, though in many cases this may mean proving a negative, viz. the non-existence of one of the exceptions introduced by the Act. Although the marginal note to section 1 speaks of the 'general immunity from jurisdiction' and this paper, therefore, speaks of a 'principle' and 'exceptions', the preceding review proves that it is only a residual immunity which a foreign State can claim in relatively few cases. The denial of immunity is so far-reaching that it is more appropriate to treat the 'exceptions' as distinct categories. Accordingly it is submitted that what may be described as the usual rules about proving exceptions should not be applicable.

THE LEGAL EFFECT OF AUTOMATIC RESERVATIONS TO THE JURISDICTION OF THE INTERNATIONAL COURT*

By JAMES CRAWFORD†

... the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising ... *Provided*, that this declaration shall not apply to ... (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America ...¹

I. INTRODUCTION

The problems raised by the so-called 'automatic reservation'² to declarations accepting the jurisdiction of the International Court under Article 36 paragraph 2 of the Statute (the Optional Clause) are among the most discussed issues in the literature of the Court.³ Debate has centred both on the undesirability of

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¹ United States declaration of 14 August 1946 accepting the Jurisdiction of the International Court under Article 36 paragraph 2: *United Nations Treaty Series*, vol. 1, p. 9. For the Senate debates on para. (b) (the Connally amendment), see Whiteman, *Digest of International Law*, vol. 12, pp. 1295-302. For its subsequent history, see *ibid.*, pp. 1305-22.

² In addition to the United States (previous note), five States still maintain automatic reservations in their declarations under Art. 36 (2): sc., Liberia (declaration of 20 March 1952: *Yearbook of the International Court of Justice*, 1977-8, p. 62), Malawi (declaration of 12 December 1966: *ibid.*, p. 64), Mexico (declaration of 28 October 1947: *ibid.*, p. 67), the Philippines (declaration of 18 January 1972: *ibid.*, p. 71), and the Sudan (declaration of 2 January 1958: *ibid.*, p. 73). A number of other States formerly maintained such a reservation: these included France (declaration of 18 February 1947, withdrawn 10 July 1959: Whiteman, *Digest of International Law*, vol. 12, p. 1335), India (declaration of 7 January 1956, withdrawn 14 September 1959: *ibid.*, p. 1336), Pakistan (declaration of June 1948, May 1957, withdrawn 13 September 1960: *ibid.*, p. 1336), South Africa (declaration of 12 November 1955, terminated 12 April 1967: *Yearbook of the International Court of Justice*, 1955-6, p. 198) and the United Kingdom (declaration of 18 April 1957, withdrawn 26 November 1958: Whiteman, *Digest of International Law*, vol. 12, pp. 1334-5). The exact terms of these reservations varied to some extent: see below, p. 67 n. 5.

³ See especially Briggs, *Recueil des cours*, 93 (1958-I), pp. 223-367 at pp. 328-63, and in *American Journal of International Law*, 33 (1959), pp. 301-18; Dubisson, *La Cour internationale de justice* (1964), pp. 180-95; Farmanfarma, *The Declared Jurisdiction of the International Court of Justice* (1952), pp. 94-102; Guerrero, in *Spiropoulos Festschrift* (1957), pp. 207-12; Goldie, *UCLA Law Review*, 9 (1962), pp. 277-359; Greig, *International Law* (2nd edn., 1976), pp. 651-7; Holloway, *Les Réserves dans les traités internationaux* (1958), pp. 317-51 and *Modern Trends in Treaty Law* (1967), pp. 654-64, 683-97; Jennings, *International and Comparative Law Quarterly*, 7 (1958), pp. 349-66; Maus, *Les Réserves dans les déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de justice* (1959), pp. 149-63; Rosenne, *The Law and Practice of the International Court* (1965), vol. I, pp. 395-9; Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (1965), *passim*; and Waldock, this *Year Book*, 31 (1954), pp. 96-142 at pp. 131-7, and *ibid.*, 32 (1955-6), pp. 244-87.

automatic reservations and on their legal validity or effect. As to the former, it is generally held that automatic reservations have a most undesirable effect on the Court's 'compulsory' jurisdiction, resulting in a fragmented, uncertain and subjective jurisdiction capable of easy evasion, instead of the general, certain and binding jurisdiction the Optional Clause was intended to bring about.¹ Anyone who wishes to see a more general acceptance of the principle of judicial settlement of international disputes, and to that end of the compulsory jurisdiction of the Court, would agree with these criticisms, although it is an exaggeration to attribute the 'decline of the Optional Clause' to the Connally amendment and its offspring—many other reservations to Optional Clause declarations share the same faults (though they are unquestionably valid and effective).² Moreover, the assumption behind these criticisms may be that the choice is between a general and 'objective' acceptance of jurisdiction and a partial and 'subjective' one, whereas the real choice may well be—as it was, in a slightly different context, in the *Reservations* case³—between a more coherent acceptance of jurisdiction by fewer States and a more divergent, less extensive acceptance by more States. At any rate, it is not the present writer's purpose to argue that the automatic reservation is anything but the undesirable, unprincipled reservation of power it is generally agreed to be; rather, it is to examine what seems almost the settled view—at least among commentators—of the legal effect of the 'automatic reservation', that is, the view expounded so forcefully by Judge Lauterpacht in his separate opinion in the *Norwegian Loans* case⁴ and his dissenting opinion in the *Interhandel* case (*Preliminary Objections*).⁵

2. THE LAUTERPACHT VIEW

The *Norwegian Loans* opinion contains Judge Lauterpacht's most comprehensive attack on the automatic reservation, but his view was usefully restated and reinforced in the *Interhandel* dissent. There he summarized his position as follows:

- (a) the reservation in question, while constituting an essential part of the Declaration of Acceptance, is contrary to paragraph 6 of Article 36 of the Statute of the Court: it cannot, accordingly, be acted upon by the Court; which means that it is invalid:
- (b) . . . irrespective of its inconsistency with the Statute, that reservation by effectively conferring upon the Government of the United States the right to determine with finality whether in any particular case it is under an obligation to accept the jurisdiction of the Court, deprives the Declaration of Acceptance of the character of a legal instrument, cognizable before a judicial tribunal, expressing legal rights and obligations:

¹ See, e.g., the Resolutions of the Institut de Droit International: *Annuaire*, vol. 48 (II) (1959), pp. 359–60; American Bar Association, Section of International and Comparative Law, *Report on the Self-Judging Aspect of the United States Domestic Jurisdiction Reservations with Respect to the International Court of Justice* (1959); Rogers, *International and Comparative Law Quarterly*, 7 (1958), pp. 758–62, and the works cited in the previous note.

² On the 'decline of the Optional Clause' see Waldock, *this Year Book*, 32 (1955–6), pp. 244–87: his general conclusions remain true today.

³ *I.C.J. Reports*, 1951, p. 15.

⁴ *I.C.J. Reports*, 1957, p. 9 at pp. 43–66.

⁵ *I.C.J. Reports*, 1959, p. 6 at pp. 101–19.

(c) that reservation, being an essential part of the Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party . . . to the system of the Optional Clause of Article 36 (2) of the Statute, cannot invoke it as an applicant; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance. Accordingly, there being before the Court no valid Declaration of Acceptance, the Court cannot act upon it in any way—even to the extent of examining objections to admissibility and jurisdiction other than that expressed in the automatic reservation.¹

Several other judges agreed with his view in these cases,² and there was relatively little explicit dissent.³ Moreover the Lauterpacht view has received quite general critical acceptance,⁴ and the few writers who have tended to disagree have not, on the whole, provided clear or explicit justification for their disagreement.⁵ But an initial difficulty for the Lauterpacht view is that the Court itself seems to have taken a different line. In *United States Nationals in Morocco*,⁶ for example, both the applicant, France, and the respondent, the United States, had automatic reservations currently 'in force'. At no stage did the Court raise the problem of

¹ Ibid., at pp. 101–2.

² In the *Norwegian Loans* case, Judges Guerrero and (in relation to the United States reservation) Read expressly agreed with the Lauterpacht view: *I.C.J. Reports*, 1957, p. 9 at pp. 68–70, 94–5 respectively. Judge Spender in the *Interhandel* case (*I.C.J. Reports*, 1959, p. 6 at pp. 55–9) and Judge *ad hoc* Chagla in the *Right of Passage (Preliminary Objections)* case (*I.C.J. Reports*, 1957, p. 125 at pp. 166–8) also agreed. In the *Interhandel* case, Judges Klaestad and Armand-Ugon agreed except for the severance point (below, p. 68 n. 3): *ibid.*, at pp. 76–8, 91, 93–4.

³ Judge Badawi in the *Norwegian Loans* case seems to assume the validity of the reservation: *I.C.J. Reports*, 1957, p. 9 at p. 29. Judge Basdevant expressly left the point open: *ibid.*, at pp. 70–1, as did Judge Spiropoulos in the *Interhandel* case: *I.C.J. Reports*, 1959, p. 6 at p. 125. Cf. Judge Wellington Koo, *Interhandel* case (*Interim measures of protection*), *I.C.J. Reports*, 1957, p. 105 at pp. 113–14.

⁴ Writers accepting the Lauterpacht view include: Preuss, *American Journal of International Law*, 40 (1946), pp. 720–36 at p. 729; Waldock, this *Year Book*, 31 (1954), at pp. 131–3; *ibid.*, 32 (1955–6), at pp. 271–3 (though admitting that 'it may perhaps be possible to reconcile it with the letter, though not the spirit, of Article 36 (6)'), 277 (and cf. Anand, *Compulsory Jurisdiction of the International Court of Justice* (1961), pp. 197–220 at p. 204); Briggs, *Recueil des cours*, 93 (1958–I) at pp. 360–1 (but subject to severability); Jennings, *loc. cit.* (above, p. 63 n. 3), at pp. 361–3; Dubisson, *op. cit.* (above, p. 63 n. 3), pp. 186, 189; Holloway, *Modern Trends in Treaty Law* (1967), pp. 687–8; Maus, *op. cit.* (above, p. 63 n. 3), pp. 160–2; Brownlie, *Principles of Public International Law* (2nd edn., 1973), p. 703; Goldie, *loc. cit.* (above, p. 63 n. 3), p. 290. The invalidity argument was also pressed by counsel for Switzerland in the *Interhandel* case: *Pleadings* (1959), pp. 575–94; cf. pp. 14, 139, 407–12; and for Australia in the *Nuclear Tests* case: *Pleadings* (1974), vol. 1, pp. 208–10, 306–11.

⁵ Cf. Wilcox, *American Journal of International Law*, 40 (1946), pp. 699–719 at p. 712; Hudson, *American Bar Association Journal*, 32 (1946), pp. 832–6, 895–7 at pp. 835–6. Rosenne, *op. cit.* (above, p. 63 n. 3) states that the Court has 'by implication . . . rejected the vitiating concept' (at p. 398), with the result that an automatic declaration seems 'to occupy a position mid-way between a normal acceptance of the compulsory jurisdiction, and a unilateral invitation to accept the jurisdiction on the basis of the *forum prorogatum*' (at p. 399), while maintaining that the subjective reservation cannot be reconciled with Art. 36 (6) (*ibid.*). Shihata, *op. cit.* (above, p. 63 n. 3), at pp. 284–97 makes many of the points discussed here, but at a purely predictive level (cf. at p. 297). The most interesting discussion is that of Greig, *op. cit.* (above, p. 63 n. 3), who relies on the general acceptance of, or absence of objection to, such reservations as bringing about something like an amendment by subsequent practice to Art. 36, analogous to the acceptance of reservations to multilateral treaties: at pp. 654–7. For further discussion see below, pp. 76–82.

⁶ *I.C.J. Reports*, 1952, p. 176.

basing jurisdiction on declarations containing such reservations: although proceedings on the merits were suspended because of a separate United States objection,¹ that objection was subsequently dropped,² and the case proceeded to all appearances on the basis of the parties' Optional Clause acceptances. In the *Norwegian Loans* case, Judge Lauterpacht stated that 'the jurisdiction of the Court [in *United States Nationals in Morocco*] was in fact exercised not on the basis of the Optional Clause but on the principle of *forum prorogatum*',³ but the parties themselves,⁴ and, it seems, the Court,⁵ appear to have proceeded on the basis of the Optional Clause.

In the *Norwegian Loans* case, Norway, relying on the principle of reciprocity, invoked the French automatic reservation as a subsidiary objection. The Court declined to consider the validity of the French declaration:

the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservations in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it.⁶

The effect of the Norwegian invocation was accordingly to deprive the Court of jurisdiction, and the other Norwegian objections did not have to be considered.⁶ And in the *Interhandel* case, between Switzerland and the United States, the Court leapfrogged a United States' determination under its automatic reservation and upheld a separate preliminary objection on grounds of non-exhaustion of local remedies, with Judge Lauterpacht dissenting.⁷ The United States' declaration was treated as a declaration 'accepting the compulsory jurisdiction of the Court'.⁸

¹ The United States claimed that the French Application was 'not clear and definite in specifying the parties to the case other than the United States', and that there was therefore no sufficient compliance with Art. 40 (1) of the Statute and Art. 32 (2) of the Rules, requiring the parties to the case to be 'specified': *United States Nationals in Morocco, Pleadings*, vol. 1, p. 235; cf. vol. 2, pp. 424-6. The issue was whether Morocco, then under French and Spanish protectorate, was required to be a separate party.

² The United States withdrew its preliminary objection (*ibid.*, vol. 2, p. 434) after France declared that it was acting both in its own capacity and as *puissance protectrice du Maroc*, so that the Court's order would bind both France and Morocco: *ibid.*, pp. 432-3. The Court thereupon ordered the proceedings on the merits to continue: *I.C.J. Reports*, 1951, p. 109.

³ *I.C.J. Reports*, 1957, p. 9 at p. 60. To the same effect Goldie, *loc. cit.* (above, p. 63 n. 3), p. 293; Rosenne, *op. cit.* (above, p. 63 n. 3), p. 397.

⁴ Cf. French Application (*United States Nationals in Morocco, Pleadings*, vol. 1, p. 9), French Memorial (*ibid.*, p. 29), United States Counter-Memorial (*ibid.*, p. 262, but reserving 'its legal right to rely in any future case on its reservations contained in its acceptance of the compulsory jurisdiction of the Court').

⁵ *I.C.J. Reports*, 1952, p. 176 at pp. 178-9.

⁶ *I.C.J. Reports*, 1957, p. 9 at p. 27.

⁷ *I.C.J. Reports*, 1959, p. 6; see Simmonds, *International and Comparative Law Quarterly*, 10 (1961), pp. 495-547.

⁸ *I.C.J. Reports*, 1959, p. 6 at p. 23. In the *Interhandel* case (*Interim Measures of Protection*), *I.C.J. Reports*, 1957, p. 105 at p. 110, the Court stated that 'Switzerland and the United States of America have, by declarations made on their behalf, accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute'. Even more remarkably, it considered the merits of a Swiss application for interim measures, despite a clear United States invocation of the automatic reservation. See further below, p. 86 n. 4.

Of course, it remains true that the Court has never formally decided the automatic reservation issue, but, at the least, this record is inconsistent with the view that the Court has a duty to consider, *proprio motu*, the validity of a declaration containing such a reservation. It also raises the question whether the Court would indeed accept the invalidity argument, as some commentators have perceived.¹ But before discussing the difficult problems raised by the Lauterpacht view, some preliminary issues, on which there should be little or no disagreement, can be disposed of.

First of all, attempts to give content to the 'obligation' of an automatic reservation by implying a duty to make a determination in good faith, or allowing the Court to set aside a manifestly unfounded determination as an *abus de droit*, are unlikely to succeed.² The circumstances in which the reservations have so far been made seem to demonstrate the intention of the declaring States to reserve the matter from judicial determination; that is precisely the point of making the automatic reservation. Even if standards exist against which a determination could be assessed for *bona fides*,³ it seems clear that no such assessment was intended to be allowed. If confirmation is needed, it is provided by the withdrawal of United States' argument to the contrary in the *Aerial Incident* case.⁴

Secondly, although subjective reservations to Optional Clause declarations have taken different forms,⁵ it is doubtful whether the verbal differences between

¹ See especially Greig, *op. cit.* (above, p. 63 n. 3); Rosenne, *op. cit.* (above, p. 63 n. 3); Shihata, *op. cit.* (above, p. 63 n. 3).

² See Judge Lauterpacht, *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 52-5; *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at pp. 111-14. To the same effect Judge Spender, *ibid.*, at pp. 58-9; de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 210-11. On the other hand, Judge Basdevant, in the particular circumstances of the *Norwegian Loans* case where Norway claimed only in a subsidiary and tentative way the right to its genuine understanding that the issue was one of domestic jurisdiction, was prepared to determine whether any such genuine understanding existed (in his view, it did not): *I.C.J. Reports*, 1957, p. 9 at pp. 72-4. As a simple finding of fact, or as an interpretation of the French reservation, this, though a minority view, may be acceptable; but if Judge Basdevant meant that Norway's position was to be assessed against a narrower reservation different from the French reservation his position creates many difficulties. To found jurisdiction on Art. 36 (2) (the conditions for *forum prorogatum* under Art. 36 (1) not having been satisfied at that stage), the only question was whether an 'understanding' in truth existed for the purpose of the French reservation. Similarly, a party could not, under the United States' reservation, disclaim the power to make an unreasonable determination if the jurisdictional basis for the application, the Optional Clause declarations including the reservation, entailed that any determination would do. Judge Basdevant may therefore be agreeing with Judge Read's view that the French reservation (unlike the United States' one) permitted judicial scrutiny of the genuineness of the 'understanding'; scrutiny which, though not exactly review on good faith grounds, is rather similar to it: *ibid.*, at pp. 94-5, and cf. below, p. 68 n. 1. Cf. Greig, *op. cit.* (above, p. 63 n. 3), at pp. 655-6. *Quaere* if a party stated that its apparent determination was not to be treated as such unless found to be *bona fide*.

³ Which Judge Lauterpacht denied: *I.C.J. Reports*, 1957, p. 9 at pp. 51-2. In fact in each of the cases in which an automatic reservation has been invoked, it has either been held or has been obvious that the issues were not matters of domestic jurisdiction. But cf. Schlesinger, *Virginia Law Review*, 48 (1962), pp. 685-97.

⁴ *Aerial Incident of 27 July 1955, Pleadings*, pp. 322-5, 676-7: Whiteman, *Digest of International Law*, vol. 12, pp. 1306-8. And see Gross, *American Journal of International Law*, 56 (1962), pp. 357-82.

⁵ So far, these fall into three groups: those which refer to the 'determination' of the declaring State (United States, India, Pakistan, South Africa, the Sudan, Malawi); those which refer to the

them entail any difference in principle. Reference to a party's 'understanding' that an issue is domestic does not seem significantly different from a 'determination' to that effect.¹ In any event the discussion here is concerned with the legal effect of declarations reserving to a party the right to classify an issue as outside the Court's jurisdiction without according to the Court the power to regulate or review that classification on grounds such as unreasonableness or absence of good faith: the United States' reservation will be taken as the paradigm.

Thirdly, although the contrary view has been maintained,² it is clear that if an automatic reservation is in some way invalid, the whole declaration must fall. Such a central reservation must constitute 'an essential basis of the consent . . . to be bound by' the declaration.³ To sever the reservation while upholding the declaration would radically transform the extent of the obligation of judicial settlement, contrary to the fundamental principle that judicial jurisdiction is wholly dependent upon consent. If confirmation of this view is needed, it is provided by the Court's recent reference, in the *Aegean Sea Continental Shelf* case,⁴ to 'the close and necessary link that always exists between a jurisdictional clause and reservations to it'. But the basic issues remain: is an automatic reservation consistent with Article 36 of the Court's Statute, and, if not, what are the legal effects of that inconsistency?

3. THE CONSISTENCY OF AUTOMATIC RESERVATIONS WITH ARTICLE 36

Assuming, for the moment, that ordinary principles of *vires* are to be applied, the question is whether an automatic reservation is in truth consistent with Article 36. As we have seen, Lauterpacht maintained two distinct grounds of inconsistency.

'understanding' or 'opinion' of the State, or to what the State 'considers' to be within its domestic jurisdiction (Liberia, France, Mexico, the Philippines); and the unusual British reservation of disputes 'relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom . . .' (above, p. 63 n. 2). On the British reservation see Jennings, *loc. cit.* (above, p. 63 n. 3) at p. 362; Briggs, *Recueil des cours*, 93 (1958-I) at pp. 302-3.

¹ Judge Lauterpacht evidently saw no material distinction between the first and second groups (represented by the United States and French reservations): cf. *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at p. 102. He did not in terms discuss the British reservation, but cf. *ibid.*, at p. 113. Judge Read clearly thought the French reservation distinguishable from the United States one: *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 94-5, and cf. the comments of Judge Spender: *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at p. 58.

² e.g., by Judges Klaestad and Armand-Ugon: *ibid.*, at pp. 76-8, 93-4; also Briggs, *Recueil des cours*, 93 (1958-I), at pp. 360-1.

³ Cf. Vienna Convention on the Law of Treaties (1969), Art. 44. The inseparability argument is maintained *inter alia* by Judge Lauterpacht: *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 55-9; *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at pp. 116-17; Judge Spender, *ibid.*, at pp. 55, 57; de Visscher, *op. cit.* (above, p. 67 n. 2), pp. 212-13; Rosenne, *op. cit.* (above, p. 63 n. 3), p. 397. The Court did not need to determine a similar issue in the *Right of Passage (Preliminary Objections)* case, *I.C.J. Reports*, 1957, p. 125 at p. 144. But see Judge *ad hoc* Chagla at p. 167 (agreeing with the Lauterpacht view).

⁴ *I.C.J. Reports*, 1978, p. 3 at p. 32.

(1) *The compétence de la compétence: Article 36 paragraph 6*

Article 36 paragraph 6 of the Court's Statute provides that:

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The Court's jurisdiction to determine its jurisdiction can be regarded as one of the fundamental principles of its organization.¹ In the *Nottebohm* case (*Preliminary Objection*) the Court described the rule as one which, though 'accepted by general international law in the matter of arbitration assumes particular force when the international tribunal . . . is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is . . . the principal judicial organ of the United Nations'.² Moreover the Court is commanded by Article 92 of the Charter and by Article 1 of its Statute to 'function in accordance with the provisions' of the Statute: to add even further force to this requirement, the Statute is made an 'integral part' of the Charter.³ Obligations under the Statute are thus 'obligations of the Members of the United Nations under the present Charter' which prevail over any other international agreements.⁴ If a declaration containing an automatic reservation is inconsistent with Article 36 paragraph 6, then it can be conceded that the Court has no power to act on it, any more than it could act, for example, on a *compromis* which stipulated that only specified judges could sit.⁵ An analogy can be drawn with the problem of extra-mural delegations of authority to the political organs of the United Nations: it is established that no such delegation can be accepted and acted upon which is inconsistent with the 'basic structure' of the organ in question.⁶ This principle must apply *a fortiori* to a judicial organ of the United Nations.⁷

But it remains to be seen whether the automatic reservation is in truth inconsistent with Article 36 paragraph 6. The argument for inconsistency was put by Lauterpacht as follows:

If that type of reservation is valid, then the Court is not in the position to exercise the power conferred upon it—in fact, the duty imposed upon it—under paragraph 6. The French reservation lays down that if, with regard to [a] particular question, there is a dispute between the Parties as to whether the Court has jurisdiction, the matter shall be settled by a decision of the French Government. The French reservation is thus not only contrary to one of the most fundamental principles of international—and national—jurisprudence according to which it is within the inherent power of a tribunal

¹ Cf. Judge Lauterpacht, *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 44–7; *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at p. 104. And see generally Shihata, *op. cit.* (above, p. 63 n. 3), especially at p. 296.

² *I.C.J. Reports*, 1953, p. 111 at p. 119. Cf. *Ambatielos* case (*Jurisdiction*), *I.C.J. Reports*, 1952, p. 28 at p. 83 (Judge Klaestad).

³ Charter, Art. 92.

⁴ Charter, Art. 103.

⁵ Cf. *Free Zones* case, *P.C.I.J.*, Series A, No. 22 (1929), p. 12, and Judge Lauterpacht, *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 44–6.

⁶ See this writer, *The Creation of States in International Law* (1979), pp. 323–33 and authorities there cited.

⁷ Whether or not such an instrument would be invalid, the Court would be precluded from acting on it in such a case: cf. below, p. 80.

to interpret the text establishing its jurisdiction. It is also contrary to a clear specific provision of the Statute of the Court . . .¹

The first difficulty with this argument is that it treats the automatic reservation as if it were a conferral of jurisdiction on the Court except for matters of domestic jurisdiction properly so-called, together with a withdrawal from the Court of competence to determine whether a matter is truly within domestic jurisdiction or not. But it seems clear that the term 'domestic jurisdiction' is not being used in its ordinary meaning as a term of art in the reservation: rather a composite term ('domestic-jurisdiction-as-understood-by-the-French-Government') is playing the role of escape clause. The use of legal terminology in this way is no doubt an abuse of language, but the view that a reservation really does only except domestic jurisdiction in the orthodox sense, while depriving the Court of jurisdiction to determine the domestic jurisdiction question, not only attaches too much weight to the words 'domestic jurisdiction' taken out of context, but might well support some form of review of a determination on good faith grounds—a position which has already been rejected.² In reality the phrase 'domestic jurisdiction as determined by the United States' and its variants play the sort of role here that the 'vital interests' clause used to play in earlier arrangements for judicial settlement, arrangements which, whatever the extent of obligation involved, seem to have been regarded as 'treaties' (and were certainly not treated as void).³

To put it another way, Lauterpacht's argument seems to assume that the Court must not merely be in the position of being able to decide on its jurisdiction, but must be fully master of the issue which will determine that decision, and that the issue here is one of 'domestic jurisdiction', rather than whether the government in question has made the relevant determination. But if the jurisdiction issue is the latter rather than the former, it is hard to see how the Court is prevented from determining it 'in the event of a dispute'.

In only one situation can it be argued that the Court might not be able to make a decision under Article 36 paragraph 6: viz., where a respondent State raises unrelated jurisdictional objections, while expressly reserving, or at any rate refusing to state, its position in relation to the automatic reservation. Since a *forum prorogatum* is not usually established before all jurisdictional objections are disposed of and the party in question pleads to the merits of the dispute, the respondent State in this situation would seem to be given an unfair advantage: the regular jurisdictional issues can be relied on first, and if these fail the automatic reservation provides a way out. It is suggested that the answer to this problem may depend on the way in which the respondent State makes its jurisdictional objections. Given the Court's established practice of dealing in the

¹ *I.C.J. Reports*, 1957, p. 9 at p. 44. To the same effect Judge Guerrero, *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 68–94; Judge Read, *ibid.*, at pp. 94–5; Judge Spender, *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at p. 56; Judge Klaestad, *ibid.*, at p. 76; Judge Armand-Ugon, *ibid.*, at pp. 92–3.

² Above, p. 67. But cf. Greig, *op. cit.* (above, p. 63 n. 3), pp. 654–5.

³ But cf. Judge Lauterpacht, *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 61–3. See further Shihata, *op. cit.* (above, p. 63 n. 3), pp. 47–52.

first phase of a case with all jurisdictional and related objections (other than those which it decides to join to the merits), there are two possibilities. Either the respondent State makes its jurisdictional objections in such a way as expressly or impliedly to waive its right to invoke the automatic reservation, or it does not. In the former case there is no problem. In the latter case the Court is not immediately provided with the material on which to make a decision, and it might be necessary ('in the event of a dispute') to ask the respondent State, under Article 49 of the Statute, for its attitude or determination. Again, if the respondent State gave a definite reply there would be no difficulty. Only if it refused to make a determination while reserving the right to do so subsequently would there be any problem. In such a case it would be open to the Court to decide that it had no jurisdiction, since the required certainty or definiteness for a determination of jurisdiction would not exist. But in the *United States Nationals in Morocco* case, as we have seen,¹ a distinct jurisdictional objection was taken in terms which, at least initially, did not imply any waiver of the United States' right to invoke its automatic reservation: nonetheless, the written proceedings were simply continued, without intervention by the Court, until the situation became clear. Whether the same attitude would have been adopted if the problem had arisen at the oral stage of the proceedings we cannot know. Certainly there might be good grounds for intervention by the Court at this stage, but its attitude to invocations of automatic reservations so far has been decidedly low-key,² and it might be able to construe the parties' dispute as restricted to other jurisdictional issues, so that the automatic reservation point would not be in 'dispute' under paragraph 6, and the parties could be taken to have left the issue to be raised subsequently, or not at all. In any event, it is suggested that even in this extreme case it is open to the Court to make the required decision under Article 36 paragraph 6.³

Three further arguments might be adduced to demonstrate inconsistency, although only the first of them was expressly dealt with by Lauterpacht.

In the first place, a distinction is sought to be made between the merely verbal

¹ Above, p. 65.

² Above, p. 66.

³ A similar problem might arise where a respondent State neither appeared nor invoked the automatic reservation in question. In case of non-appearance of a party, the Court must 'satisfy itself . . . that it has jurisdiction' (Statute, Art. 53 (2)). It is submitted that the Court could properly satisfy itself as to its jurisdiction, in such a case, on the following basis. If the automatic reservation has been made by, or is held to be opposable to, the respondent State, then it is for that State, not the Court, to invoke (and thus activate) it. A State which has had the opportunity to do so but did not exercise it can hardly require the Court to do so on its behalf. But the case would be otherwise if the Court held, first, that the true legal status of an automatic reservation was one of non-opposability rather than invalidity (a position argued for below, p. 85), and secondly, that the respondent State had neither made such a reservation itself, nor consented to the operation of the applicant's automatic declaration *vis-à-vis* its own Optional Clause declaration. In this latter case, failure to appear would presumably have to be construed as rejection of the other State's application, or, more correctly, as a refusal to accept an application founded on an automatic reservation. In such particular (and most unlikely) circumstances, there would be no mutuality of consent between the relevant declarations, and the Court could not be satisfied that it had jurisdiction. (*Mutatis mutandis*, a similar problem could arise in the case of an application by a Security Council Resolution 9(I) State against a party to the Statute: cf. below, p. 84.) For present purposes, what is crucial is that there are legal principles on which the Court can act in exercising its jurisdiction to determine its jurisdiction, in all conceivable cases.

'registering' of absence of jurisdiction and a substantive decision about jurisdiction. The Court must always be able to make the latter form of decision. Thus Lauterpacht:

it has been said that if the Court declines jurisdiction by reference to the 'automatic reservation' it is actually, in full conformity with Article 36 (6), making a decision on the question of its jurisdiction. This argument is of a verbal character. For in that case it is not the Court which makes the actual decision on the question of its jurisdiction. The decision is made by the defendant Government . . . The Court merely registers it. Moreover, the Court says so in its Judgment. It states in effect that its task is confined to registering the decision of the defendant State . . .¹

But Article 36 paragraph 6 says nothing about the *grounds* on which a decision on jurisdiction is to be made: it merely requires that the Court should be able to make it. On Lauterpacht's view, when the Court removes from its list an application (such as those in the *Aerial Incident*² or *Antarctica*³ cases) made without any previous submission to the jurisdiction, the defendant State having declined to appear, it is not exercising power under Article 36 paragraph 6 but is 'registering' the absence of jurisdiction under some inherent power. Equally, in a case where the parties, pursuant to a common Optional Clause reservation, 'agree to have recourse to another means of peaceful settlement', the Court's role will be simply to register this fact and suspend or terminate proceedings; yet there seems to be no reason to doubt that it would be acting under Article 36 paragraph 6 in doing so.⁴ One might add that even in the case of an automatic reservation there might be room for doubt as to whether an apparent invocation of the reservation was so in fact, whether the agent invoking the declaration was properly authorized to do so, and so on.⁵

Secondly, it might be argued that Article 36 paragraph 6 requires that the Court be able to determine its jurisdiction not merely at some stage of the proceedings, but at every stage, so that unless the Court can in principle determine whether it has jurisdiction at the commencement of the proceedings, its duty is to go no further. Clearly, if this were so, the defeasible, uncertain and prima-facie jurisdiction conferred by an automatic declaration would pose problems. However, it is doubtful whether there is any such requirement. The Rules of Court, for example, have always required that the applicant specify 'as far as possible' the grounds for jurisdiction (rather than that they be specified exhaustively or completely);⁶ this formula was inserted, and retained, expressly to meet the case where jurisdiction may not be definitively established until a later

¹ *I.C.J. Reports*, 1957, p. 9 at p. 47. Cf. at p. 48, where a related argument is described as 'of a dialectical character'.

² *I.C.J. Reports*, 1956, pp. 6, 9. Cf. also *I.C.J. Reports*, 1954, pp. 99, 103.

³ *I.C.J. Reports*, 1956, pp. 12, 15.

⁴ Cf. Shihata, *op. cit.* (above, p. 63 n. 3), pp. 295 ('In order to reach the conclusion that the reservation is valid or not, the Court necessarily exercises an aspect of this power which it cannot be deprived of'), 297.

⁵ Waldock, this *Year Book*, 32 (1955-6), at p. 272 n. 2. Cf. the facts in the *Norwegian Loans* case itself: above, p. 67 n. 2.

⁶ Rules of Court, Art. 35 (2).

stage and to allow, for example, for a *forum prorogatum*.¹ Moreover Article 36 paragraph 6 only requires the Court to determine its jurisdiction 'in the event of a dispute'. In the present case, if there is no dispute (and no invocation of the automatic reservation), then no problem exists; if there is a dispute the position will presumably be, or rapidly become, clear.² Lauterpacht's argument greatly exaggerates the duty of the Court to raise jurisdictional objections *proprio motu*: in practice the Court has been reluctant to do so,³ a practice that is the more striking when contrasted with cases involving admissibility⁴ or mootness.⁵ No doubt the Court, confronted with a case of defeasible or prima-facie jurisdiction only, might be in some difficulty, for example, in ordering interim measures of protection, but it is suggested that the solution lies in an exercise of discretion rather than a denial of jurisdiction.⁶

Finally, the 'inherent' power to determine jurisdiction almost certainly carries some implication for wrongful or erroneous jurisdictional decisions. In contrast to an *ad hoc* arbitral tribunal, one of the powers of a standing court in this situation may well be to be mistaken—or, to put it less paradoxically, the right of a party to a decision to reject that decision as manifestly unfounded (at least on jurisdictional grounds) must surely be modified in the case of a standing court.⁷ If this is so, and if the purpose of an automatic reservation is to exclude this aspect of Article 36 paragraph 6 also, then the argument for inconsistency becomes very much stronger. However, there is no indication, in the *travaux* of the relevant declarations or elsewhere, that the automatic reservation was intended to have this effect. No doubt the making of such a reservation demonstrates little faith in the Court, but enough, one would have thought, to leave to the Court the competence to determine whether an automatic reservation had in fact been invoked.⁸ This is particularly so in that by Article 94 paragraph 1 of the Charter, Members 'undertake to comply with the decision of the Court in any case' in

¹ See Greig, *op. cit.* (above, p. 63 n. 3), pp. 641–3; Guyomar, *Commentaire du règlement de la cour internationale de justice* (1973), pp. 172–83.

² Above, p. 71.

³ Although the Court stated in the *Jurisdiction of the I.C.A.O. Council* case, *I.C.J. Reports*, 1972, p. 46 at p. 52, that it must 'always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*', that remark was not directly relevant to any issue in the case. In the *Rights of Minorities in Upper Silesia (Minority Schools)* case, on the other hand, the Court did not raise jurisdictional objections on behalf of Poland, but held that Poland had impliedly consented to its jurisdiction by failure to take those objections, and by pleading to the substantive issues. It contrasted its position with that of municipal courts, for which jurisdictional limits were independently binding and which therefore had an obligation to consider jurisdictional objections *ex officio*: *P.C.I.J.*, Series A, No. 15 (1928), at p. 23. Cf. Shihata, *op. cit.* (above, p. 63 n. 3), pp. 66–8, 296. The absence of any duty in the Court to raise jurisdictional objections only applies, however, to cases where the parties themselves can raise on their own behalf any relevant objections (and consequently can waive them), not to cases of non-appearance of a party (cf. Art. 53 (2) of the Statute) or where the legal position of a third State is directly affected: cf. *Monetary Gold removed from Rome*, *I.C.J. Reports*, 1954, p. 19.

⁴ e.g., *South West Africa cases (Second Phase)*, *I.C.J. Reports*, 1966, p. 6.

⁵ e.g., *Nuclear Tests cases*, *I.C.J. Reports*, 1974, pp. 253, 457.

⁶ Below, p. 86 n. 4.

⁷ Shihata, *op. cit.* (above, p. 63 n. 3), pp. 68–73 (with references to earlier literature).

⁸ On the other view, a party would have to determine not merely that it regarded the matter as within its domestic jurisdiction, but also that it had made such a determination. Even then, presumably, the Court must retain *la compétence de la compétence de la compétence*!

which they are parties, including, of course, decisions made by virtue of Article 36 paragraph 6—an obligation which exists prior to, and independently of, the automatic declaration. To illustrate, if counsel for the respondent State, in his closing remarks, made an ambiguous reference to an applicable automatic reservation, and the Court, in giving judgment, interpreted and gave effect to the statement as an invocation of the reservation, the respondent State could hardly re-establish or reinstate the case by protesting that it had no intention of invoking the reservation. Indeed, according to some of the dissentients, Norway was in precisely this position in the *Norwegian Loans* case.¹

(2) *The element of obligation: Article 36 paragraph 2*

Lauterpacht's second objection centred on the principle of compulsion or obligation which was regarded as fundamental to Article 36 paragraph 2. In his words:

the Acceptance embodying the 'automatic reservation' is invalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent of its obligation. The effect of the French reservation relating to domestic jurisdiction is that the French Government has, in this respect, undertaken an obligation to the extent to which it, and it alone, considers that it has done so. This means that it has undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose.²

This objection draws its force from the use of the words 'compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation' in paragraph 2. Conceding that an automatic reservation imposes no obligation to make a *bona fide* determination, it is indeed hard to see exactly what obligation is entailed by such a reservation. It might perhaps be suggested that there is an obligation on the declaring State either to make a determination or to submit to the substantive jurisdiction of the Court; the same sort of obligation I would be under if I agreed to pay as rent for demised premises either one thousand pounds or a peppercorn. But it is doubtful whether the problem can be evaded in this way, since a peppercorn is (in law) an object possessing at least a notional value, whereas it is hard to see how a determination under an automatic reservation has any value at all, in this sense. A more exact analogy would be an obligation to pay rent unless I write declaring my inability to pay: in such a case it would be stretching language to describe me as under any obligation at all, at least if I were the sole judge of my own solvency. It does not seem right to treat someone as under an obligation who can avoid the substantive burden simply by following a procedure which is itself of no value to anyone.

¹ Above, p. 67 n. 2.

² *I.C.J. Reports*, 1957, p. 9 at p. 48. Cf. *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at pp. 106-7. See also Judge Guerrero, *I.C.J. Reports*, 1957, p. 9 at p. 68; Judge Spender, *I.C.J. Reports*, 1959, p. 6 at p. 56.

Alternatively, it might be said that an automatic declaration attracts the obligation to submit to the incidental jurisdiction of the Court pending a determination under the reservation; that is, to submit to the jurisdiction to determine jurisdiction under Article 36 paragraph 6 and to the possibility of interim measures of protection under Article 41. But again this seems unlikely. The Court's power under Article 36 paragraph 6 does indeed exist in this case, as we have seen; but we have also seen that the power is of rather a nominal character. Moreover it is not recognized as 'compulsory' by virtue of the declaration but by virtue of the State's participation in the Statute. The power to indicate interim measures might perhaps be activated by an automatic declaration, but as will be seen, this creates its own problems.¹ The fundamental objection, however, is that the obligation contemplated by Article 36 paragraph 2 is not this incidental jurisdiction but an obligation to submit *some* substantive issue to adjudication, and with an automatic reservation it is impossible to say of any specific issue that it has been submitted to the jurisdiction of the Court.

It does seem therefore that an automatic declaration does not impose any substantive obligation on the State making it. The question remains whether there is a requirement implicit in Article 36 paragraph 2 that some such obligation be assumed, similar to the basic or constituent requirement which, we have seen, underlies Article 36 paragraph 6. It is not entirely clear that this is so. Certainly, there are fundamental principles underlying paragraph 2: specifically, the basic principle of consent to jurisdiction, and the related principle of reciprocity by which each State party to a case brought under the Optional Clause can rely on reservations or limitations in the other State's declaration.² But it is not clear that there is a third underlying requirement, that what is recognized should constitute a substantive *obligation*. The term 'obligation' in paragraph 2 is more a description of what is recognized than a requirement of what should be: the term 'compulsory' is certainly stronger, but an automatic declaration does constitute *something*, even if only a procedure.

One's conclusion on this issue must depend on whether one emphasizes the procedural, facultative nature of paragraph 2, or extracts from its terms a limiting requirement of obligation. A further issue would be whether State practice is relevant in making this decision, since, as will be seen, the emphasis has been on the former, rather than the latter, attribute or purpose of the Optional Clause. But before any firm conclusion can be reached, it is necessary to reflect a little more on the nature of the test for inconsistency which is to be applied.

(3) *Automatic reservations and 'applicable principles of law' for inconsistency*

So far the arguments about inconsistency have proceeded on the assumption that ordinary principles of interpretation and *vires* are to be applied. However, the automatic reservation is, in a way, a reservation to (at least, pursuant to) a multilateral treaty, and it is possible that the relevant rules for inconsistency are the rules for reservations to multilateral treaties, which are regarded as allowing

¹ Below, p. 86 n. 4.

² See generally Rosenne, *op. cit.* (above, p. 63 n. 3), pp. 373-4, 384-8.

a greater degree of subjectivity, leaving issues of participation substantially to the other States parties to the treaty. In other words, although the Court would still have to determine the issue under Article 36 paragraph 6, it would, on this view, do so by interpreting and registering the actions of the States parties to the Optional Clause in objecting or not objecting to automatic reservations. It is proposed, then, to consider, first, whether treaty reservation rules are appropriately applied here (and briefly the nature of those rules); secondly, the consequence of applying them to the automatic reservations so far made, and thirdly, the consequences of applying instead orthodox principles of *vires*. Although the lines of reasoning differ, depending on which approach is adopted, it will be argued that the end result is much the same.

(i) *The relevance of treaty reservation rules in determining inconsistency.* There has been a long, but inconclusive, debate as to the juridical nature of declarations under the Optional Clause.¹ Certainly the Statute is a multilateral treaty, but Article 36 paragraph 2 establishes an optional regime additional to participation in the Statute itself. Declarations under it are unilateral acts, although they give rise to obligations *vis-à-vis* reciprocating States. Not surprisingly, it has proved difficult to classify a unilateral act creating bilateral obligations under a multilateral treaty, and such guidance as the Court has afforded has been equivocal. In the *Anglo-Iranian Oil Co. case (Jurisdiction)* the Court stated that . . .

the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran. . . .²

This has been explained as directed to the interpretation of the *text* rather than to the legal status of the instrument,³ but it is significant that the Court has not applied to declarations under the Optional Clause rules of treaty interpretation as such; rather, such principles are extended by analogy, or similar principles are generated independently of their application to treaties.⁴ Again, in the *Phosphates in Morocco case*,⁵ the Court categorized the French declaration as 'a unilateral act by which the Government accepted the Court's compulsory jurisdiction'.

On the other hand, in the *Electricity Company of Sofia case*,⁶ the Court said that, as a result of the two declarations:

¹ Rosenne, *op. cit.* (above, p. 63 n. 3), at pp. 409-14 ('a *sui generis* international engagement'); Maus, *op. cit.* (above, p. 63 n. 3), pp. 53-62 ('des actes unilatéraux'); de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), ch. 3, especially at p. 199 ('un acte unilatéral générateur d'effets contractuels'); Holloway, *Les Réserves dans les traités internationaux* (1958), pp. 319-22 ('ces déclarations ne sont unilatérales que par leur rédaction . . . Aussi ces déclarations sont elles à la fois des traités bilatéraux et des traités multilatéraux'); cf. *Modern Trends in Treaty Law* (1967), pp. 652-3 ('multilateral acts . . . of a special character'); Dubisson, *op. cit.* (above, p. 63 n. 3), pp. 192-5 ('un acte juridique unilatéral source d'obligations contractuelles').

² *I.C.J. Reports*, 1952, p. 93 at p. 105. To the same effect, Judge Hackworth, dissenting, *ibid.* at p. 139.

³ Judge Read, dissenting, *ibid.*, at p. 142; Waldock, this *Year Book*, 32 (1955-6), pp. 244-87, at p. 253.

⁴ Cf. Rosenne, *op. cit.* (above, p. 63 n. 3), pp. 405-9.

⁵ *P.C.I.J.*, Series A/B, No. 74 (1938), at p. 23.

⁶ *Ibid.*, No. 77 (1939), at p. 87.

an agreement came into existence between these two States accepting the compulsory jurisdiction of the Court. . . . This agreement, hereinafter referred to as the Declarations, came into force on March 10th, 1926, the date of the Belgian ratification.

Judge Anzilotti in the same case referred to the declarations as a 'convention'. Judge Urrutia stated that they were 'equivalent in law to an international agreement between [the two parties] within the limits fixed by the reservations in the Belgian declaration'.² But Judge Urrutia's *dictum* points to a material difference between treaty reservations and reservations in Optional Clause declarations. In the former case there is a single agreed text: both conceptually and temporally the reservation is subsequent to agreement on the content of the treaty from which it derogates. In the case of the Optional Clause, since it is established that reservations can be freely made,³ there simply is no prior agreement: the reservation is an integral part of the act which constitutes the agreement. The better view would seem to be that the applicability of treaty reservation rules cannot be settled by abstract analysis of the nature of Optional Clause declarations; rather, the question is to what extent those rules have been applied in practice, by other States and by the Court itself.⁴

In examining that practice, the first and striking fact is that, although many far-reaching reservations have been made, only one objection has ever been made to an Optional Clause reservation: viz., the Swedish objection⁵ to the Portuguese declaration of 19 December 1955.⁶ Sweden objected that the power to withdraw a category of disputes from the Court at any time meant that Portugal had . . .

not bound itself to accept the jurisdiction of the Court with regard to any dispute or any category of disputes. The condition nullifies the obligation intended by the wording of Article 36, paragraph 2, of the Statute. . . . For the stated reason, the Swedish Government must consider the cited condition as incompatible with a recognition of the 'Optional Clause' . . .

The Portuguese reply,⁷ apart from disputing the Swedish interpretation of its declaration, stated that 'in any case, the Court alone is competent to pronounce on the validity of these declarations'.

In fact, the validity of the Portuguese declaration was dealt with by the Court in the *Right of Passage* case (*Preliminary Objections*). There it upheld, with one dissentient,⁸ the validity of the Portuguese declaration, without referring to the Swedish objection or to the fact that India had made no such objection.⁹ It said:

¹ Ibid., at p. 89; cf. p. 100. See also Judge Alvarez, dissenting, *Anglo-Iranian Oil Co. case* (*Jurisdiction*), *I.C.J. Reports*, 1952, p. 93 at p. 125 ('a multilateral act of a special character').

² *P.C.I.J.*, Series A/B, No. 77 (1939), at p. 103.

³ Below, p. 79.

⁴ Cf. Bowett, this *Year Book*, 48 (1976-7), pp. 67-97 at p. 76: he regards the Optional Clause problems as 'related but not strictly analogous' because the Clause does not involve a 'treaty link'.

⁵ Letter of 23 February 1956: *Right of Passage Case, Pleadings* (1960), vol. 1, p. 217.

⁶ Ibid., p. 216.

⁷ Letter of 5 July 1956: *ibid.*, p. 218.

⁸ Judge *ad hoc* Chagla: *I.C.J. Reports*, 1957, p. 125 at pp. 166-8.

⁹ In fact the Portuguese declaration was lodged only a few days before its application against India: there had hardly been time for such an objection.

In order to decide whether, as maintained by the Government of India, the Third Condition appended by Portugal is invalid. . . . the Court must determine the meaning and the effect of the Third Condition by reference to its actual wording and applicable principles of law.¹

Although the 'applicable principles of law' were not further specified, the case provides little support for the application of treaty reservation rules. Nor were such rules applied by any of the judges who discussed the matter in the *Norwegian Loans* and *Interhandel* cases.² Although the Court in the *Norwegian Loans* case stressed both parties' acceptance of the French reservation,³ that emphasis was just as consistent with the interpretation of treaty provisions by subsequent practice as the application of treaty reservation rules.

Nonetheless it is helpful to consider what the position would be if treaty reservation rules were to be applied here. A useful starting-point is Articles 19 and 20 of the Vienna Convention on the Law of Treaties,⁴ which provide in part:

19. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is inconsistent with the object and purpose of the treaty.

20. . . .

(3) When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

(4) In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary indication is definitely expressed by the objecting State. . . .

(5) . . . [A] reservation is considered to have been accepted by a State if it shall have raised no objection by the end of the period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

The Convention is not yet in force, but these provisions reflect the substantial change in international reservations practice since the *Reservations to the*

¹ *I.C.J. Reports*, 1957, p. 125 at p. 142.

² In the *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at p. 105, Judge Lauterpacht referred to treaty reservation rules, but more to support his argument on *a fortiori* grounds than for use in determining inconsistency.

³ Above, p. 66 n. 6.

⁴ *International Legal Materials*, 8 (1969), p. 679.

Genocide Convention case,¹ and it seems likely that, with one or perhaps two exceptions,² they represent customary international law on the matter.³ If so, and if they apply to the Optional Clause, it is remarkable that they seem to prohibit reservations altogether, on two distinct grounds. First, Article 36 paragraph 3 allows declarations to be made 'unconditionally or on condition of reciprocity on the part of several or certain States,⁴ or for a certain time'. This seems to be a clear case of a treaty providing that 'only specified reservations, which do not include the reservation in question, may be made',⁵ in which case all other reservations should be prohibited. Yet in practice such reservations were made and accepted from an early stage in the history of the Permanent Court.⁶ When Article 36 was adopted verbatim in the Statute of the present Court, it was understood that reservations to Optional Clause declarations would continue to be permissible in the same way.⁷ The process by which such reservations came to be accepted is a striking case of interpretative development of Article 36 by subsequent practice, since quite apart from Article 19 (b) of the Vienna Convention, the terms of paragraph 3 ('unconditionally or on condition of reciprocity . . .') suggest that no other conditions were intended.

Secondly, although the Statute is, in a sense, the 'constituent instrument of an international organization' (the Court itself), there has been no express acceptance of particular reservations (as distinct from the practice of making reservations) by the Court ('the competent organ of that organization'). The Court confronted with this issue would, as a judicial organ, have to apply 'applicable principles of law', whereas Article 20 paragraph 3 of the Vienna Convention does not require acceptance or rejection to be on legal grounds at all. This second factor, at least, reinforces the view that treaty reservation rules are not directly relevant here.⁸

¹ *I.C.J. Reports*, 1951, p. 15.

² Art. 20 (4) (b) requires a State objecting to participation of a reserving State (and not merely to the particular reservation) to indicate such objection expressly. It is probable that the question is determined, under customary international law, as a matter of construction: cf. Bowett, loc. cit. (above, p. 77 n. 4), p. 85 n. 2. This was the approach adopted (without referring to Art. 20 (4) (b)) by the Court of Arbitration in its Decision of 30 June 1977 relating to the *Delimitation of the Continental Shelf (United Kingdom v. France)*, paras. 57, 61. A second exception is likely to be the express time limit of twelve months for objections under Art. 29 (5). See also below, n. 8, on Art. 20 (3).

³ Cf. Court of Arbitration, Decision of 30 June 1977, paras. 37-8; Bowett, loc. cit. (above, p. 77 n. 4), pp. 88-90. See further Holloway, *Modern Trends in Treaty Law* (1967), pt. 3; Brownlie, op. cit. (above, p. 65 n. 4), pp. 587-90; Anderson, *International and Comparative Law Quarterly*, 13 (1964), pp. 450-81; Sinclair, *ibid.*, 19 (1970), pp. 47-69 at pp. 53-60. For the older view see McNair, *The Law of Treaties* (1961), pp. 158-77.

⁴ This is distinct from the general principle of reciprocity under Art. 36 (2), which is assured by the words 'accepting the same obligation', irrespective of the terms of particular declarations.

⁵ Vienna Convention, Art. 19 (b).

⁶ Cf. Fachiri, *The Permanent Court of International Justice* (2nd edn., 1932), pp. 98-100; Rosenne, op. cit. (above, p. 63 n. 3), pp. 388-9.

⁷ *United Nations Conference on International Organizations, Documents* (1945), vol. 13, pp. 559, 591; cited by Rosenne, op. cit. (above, p. 63 n. 3), at p. 389. Cf. Art. 36 (5), continuing in force declarations under the former Statute 'in accordance with their terms'.

⁸ On Art. 20 (3) see Mendelson, *this Year Book*, 45 (1971), pp. 137-72. A further difficulty arises from the fact that the Statute is an integral part of the Charter, to which, it is generally agreed, reservations may not be made: *ibid.*, at pp. 155-7, and cf. Charter, Arts. 2 and 4. This

(ii) *The application of treaty reservation rules to automatic reservations.* Assuming, however, that these difficulties can be overcome, the question is what their effect would be on automatic reservations. It has already been argued that there is no inconsistency with Article 36 paragraph 6 such as to bring Article 19 (a) of the Vienna Convention into play.¹ The question is whether the absence of any substantive obligation in an automatic reservation is either prohibited (Article 19 (a)) or inconsistent with the object and purpose of the Statute (Article 19 (c)). It is unlikely that automatic reservations can be regarded as 'prohibited' by Article 36 on this ground. The element of obligation is no doubt important to the Optional Clause system, but it is not structural in the way that Article 36 paragraph 6 can be argued to be.² There being no clear prohibition of automatic reservations (apart from Article 36 paragraph 3 which has itself been in effect waived by subsequent practice) the relevant issue must be whether the automatic reservation is 'inconsistent with the object and purpose' of the Optional Clause. The argument that it is not is maintained by Kelsen:

Even without the Connally-type reservation, the reservations states may otherwise make in 'accepting' the optional clause may and do severely restrict the compass of compulsory jurisdiction. If almost any reservation has the effect of restricting the purposes and objects of Article 36, it is not easy to determine at what point the cumulative effect of such reservations, or the quality of a particular reservation, may prove incompatible with such purposes and objects. To the contrary, the objection that a State's acceptance cannot in any event derogate from the Court's power under Article 36, paragraph 6 . . . does not depend upon the purposes and objects of Article 36, paragraph 2, but upon the import of the obligation laid down in Article 36, paragraph 6. . . . The Court has yet to take a clear position on this critical issue . . .³

On the other hand, it is certainly arguable that the whole purpose of the Optional Clause is, as Sweden maintained, that the parties should bind themselves to accept the Court's jurisdiction with respect to *some* dispute or category of disputes. Given that the 'object and purpose' test is a broad and flexible one, it must be open to States parties to make that judgment of an automatic reservation. But the fundamental question remains whether it is also open to them *not* to take that position, or to put it another way, whether the Court could go behind the apparent acceptance of automatic reservations⁴ to strike them down on 'object and purpose' grounds. This raises a fundamental question of the relation between Articles 19 and 20 of the Vienna Convention: does the process of acceptance of reservations under Article 20 paragraph 4 apply only to reservations which are permissible under Article 19, that is, which are not prohibited by the treaty and are not inconsistent with its object and purpose objectively determined? Or are States acting under Article 20 paragraph 4 the judges of inconsistency, so that a

reinforces the distinction between the obligation imposed by a declaration and the 'obligations contained in' the Statute as incorporated in the Charter.

¹ Above, pp. 69-74.

² Above, p. 69; and cf. Kelsen, *Principles of International Law* (2nd edn., 1966, ed. Tucker), pp. 538-9 n. 114.

³ Op. cit. (previous note).

⁴ Cf. Vienna Convention, Art. 20 (5).

Court must simply interpret and register State acceptance practice? There are difficulties with either view.

The former view seems to leave little room for Article 20, or for the process of acceptance of or objections to reservations (especially on 'object and purpose' grounds) which has become a prominent feature of practice. It involves qualifying the word 'reservation' in Article 20 paragraph 4, although it would have been easy to insert there words such as 'which is permitted by Article 19'. And it tends to contradict the view that alterations in treaty reservation rules since 1951 have introduced a marked degree of subjectivity in principle, since in principle if the former view is right only relatively minor issues are left to be decided by State acceptance practice.¹

The latter view, on the other hand, opens the way for a radical degree of subjectivity, which might approach in practice (in the absence of consistent and vigilant objection by other States) the Soviet view of an unfettered right to make reservations. On that view even a reservation positively prohibited by a treaty could be accepted under Article 20 paragraph 4; having reached agreement on the text by multilateral negotiation, the parties are then able to remake that text bilaterally.

If the latter view is correct, there can be no doubt that automatic reservations have not been objected to, and that, by application of Article 20 paragraph 5 or a customary analogue of it, States making automatic declarations are nonetheless in law parties to the Optional Clause. But it is suggested that the former view is to be preferred,² with one qualification. Article 19 of the Vienna Convention is clear in precluding certain reservations: it would be odd if Article 20 paragraph 4 then reinstated them in the absence of express protest within twelve months. But whereas a Court can readily determine whether a particular reservation is prohibited by a treaty (Article 19 (a)), the object and purpose test is less easy to apply. Manifestly, different views can be taken of the 'purpose' of a treaty, as the perennial conflict between literal and teleological interpretation of treaties demonstrates. Especially where State practice is reasonably consistent either in accepting a particular view of the object and purpose of a treaty or in not objecting to particular reservations on that ground, a court should be reluctant to substitute its own view. And the practice in relation to automatic reservations has been fairly consistent: both the Court and other States have treated automatic reservation States as parties to the Optional Clause, and no State has objected to the making of automatic reservations. Sweden's objection to the Portuguese reservation³ applied *a fortiori* to automatic reservations, but Sweden has not objected to automatic reservations before or since. It is suggested that the application of treaty reservation rules could well entail that automatic reservations have been accepted, under the customary analogue to the treaty reservation rules

¹ In practice, of course, there will often be no provision for judicial settlement of such disputes, in which case recourse will have to be had, *faute de mieux*, to State practice in objecting to or accepting reservations.

² Cf. Bowett, *loc. cit.* (above, p. 77 n. 4), at p. 80; *Reservations case*, *I.C.J. Reports*, 1951, p. 15 at p. 29.

³ Above, p. 77 n. 5.

in the Vienna Convention, as not inconsistent with the object and purpose of the Optional Clause.

(iii) *Automatic reservations and ordinary principles of vires*. The argument that the automatic reservation is inconsistent with Article 36 paragraph 2 has been canvassed already.¹ On the assumption that ordinary principles of interpretation and *vires* (as distinct from treaty reservation rules) are to be applied, it has been seen that the references in Article 36 paragraph 2 to the recognition of jurisdiction as 'compulsory *ipso facto* and without special agreement', and to the 'obligation' created by a declaration, do pose difficulties: it is most doubtful whether the automatic reservation fits these descriptions. However, the question cannot now be determined in the abstract, in isolation from State practice. Article 31 paragraph 3 of the Vienna Convention, which is in this respect probably representative of general international law,² provides that in interpreting a treaty text there shall be taken into account, together with the context . . .

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . .

It was on the basis of such interpretation by subsequent practice that the International Court in the *Namibia* opinion upheld the validity of Security Council resolutions adopted without the affirmative vote of a permanent member, despite the apparently clear terms of Article 27 paragraph 3 of the Charter.³ More directly relevant for present purposes is the practice whereby reservations to Optional Clause declarations came to be allowed at all, involving a modification of the apparently clear terms of Article 36 paragraph 3 of the Statute.⁴

However, it is uncertain whether the degree of practice here is as consistent, explicit and general as it was in these two cases. Rather than any widespread affirmative acceptance of automatic reservations, there has been acceptance in practice by a number of States,⁵ universal non-objection to such reservations, and a degree of acceptance by the Court.⁶ Whether this is sufficient to qualify as 'establishing the agreement of the parties regarding' the interpretation of paragraph 2 may be doubtful.⁷ On the other hand, if the issue is treated on a bilateral basis there is less difficulty. Since no underlying issue of *jus cogens* or basic element of the Court's structure is involved, it ought to be open to individual declarant States to accept automatic reservation States as parties *vis-à-vis* them-

¹ Above, p. 75.

² McNair, *Law of Treaties* (1961), pp. 424-31; McDougall, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* (1967), pp. 132-44.

³ *I.C.J. Reports*, 1971, p. 16 at p. 22. Cf. Judge Dillard at pp. 153-4, especially p. 154 n. 1; Judge de Castro at pp. 185-6.

⁴ Above, p. 79. Cf. *Anglo-Iranian Oil Co. case (Jurisdiction)*, *I.C.J. Reports*, 1952, p. 93, *per* Judge Levi Carneiro, dissenting, at pp. 154-5.

⁵ Obviously, the States which have made such reservations accept the practice. So too did Norway in the *Norwegian Loans* case.

⁶ Above, p. 66.

⁷ Greig, *op. cit.* (above, p. 63 n. 3), at p. 654, suggests that it is sufficient.

selves. This seems to underlie the Court's emphasis, in the *Norwegian Loans* case, on Norway's agreement with France that the French declaration formed the basis for jurisdiction in that case: 'The Court gives effect to the reservation as it stands and as the Parties recognize it.'¹

4. THE PROBLEM OF 'INVALIDITY': AUTOMATIC DECLARATIONS AS ALTERNATIVE MODES OF ACCESS TO THE COURT

A third, and in the present writer's view the most convincing, approach in the current state of practice centres around the assumption of the *invalidity* of an automatic declaration. Granting, for the sake of argument, that Article 36 paragraph 2 is, for lack of any element of obligation, not complied with, the conclusion is immediately drawn that the declaration is invalid. This conclusion is sought to be supported in two ways. First, it is said that, as a general principle, any purported legal instrument which on analysis entails no immediate legal obligation is void, incapable of generating legal consequences.² But this fails to distinguish the voidness of an instrument, for example where an overriding legal rule deprives it absolutely of legal effect, and the present lack of obligation or legal content of an instrument which is capable of generating legal consequences, for instance by a subsequent course of conduct. A well-known example is a contract unenforceable for vagueness, which may become enforceable through a course of conduct by the parties by reference to which its content can be determined. An automatic declaration surely falls in the latter, rather than the former, category. An alternative assumption appears to be that if a particular result is sought to be achieved by a particular procedure, but the requirements of that procedure are not complied with, then the instrument is void, even though there is no substantive illegality. This is surely only so when there is a rule that the prescribed procedure is the *only* way of achieving that result; and then the instrument is void simply because of its incapacity to achieve that result, rather than in any more basic sense. Where more than one procedure exists for achieving the result, failure to comply with the conditions of one procedure need not bring invalidity if the conditions of the other are satisfied, and if the underlying intention was to achieve the result and not merely to achieve it only by the one procedure. An act *ultra vires* under the intended head of power may turn out to be valid under another.

If this is so, two things may be noted about Article 36. First, the only underlying principles in this field are those of consent and reciprocity,³ which for present purposes have no peremptory effect. There is no question of illegality. Secondly, it cannot be said that Article 36 paragraph 2 is an exhaustive, exclusive method of seising the Court by declaration as distinct from treaty. Indeed, paragraph 2 is in a sense a sub-class of paragraph 1, which provides simply that the

¹ Above, p. 66 n. 6.

² For Judge Lauterpacht's argument see *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 9 at pp. 48-51; *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at pp. 106-7.

³ Apart from Art. 36 (6): above, p. 69.

Court has jurisdiction in 'all cases which the parties refer to it'.¹ As the Court said in the *Upper Silesia (Minority Schools)* case:

The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it. . . . The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement.²

Of course, declarations under the Optional Clause are in principle independent of treaty provisions and the like conferring jurisdiction under Article 36 paragraph 1,³ but the reason this is so is, surely, that the Optional Clause declarant intends to accept the Court's jurisdiction *vis-à-vis* other declarants, and not just any State which has accepted the Court's jurisdiction *ad hoc* or by treaty. This is a major function of the words 'accepting the same obligation' in paragraph 2. But there is nothing to prevent a party to the Optional Clause from treating a State which has made a declaration to similar effect (although that declaration is made formally under paragraph 1 rather than paragraph 2) as if the latter was a party to the Optional Clause. Such acceptance would require first, a coexistence of subject-matter in the two declarations (on normal principles of reciprocity), and secondly some mutual acceptance of the declarations as creating 'new ways of access to the Court'.⁴

In fact, just such a system already exists in the procedure by which non-parties to the Court's Statute can recognize its jurisdiction. Security Council Resolution 9 (I) provides that such States may lodge general declarations . . .

in accordance with Article 36, paragraph 2 of the Statute . . . provided, however, that such acceptance may not, without explicit agreement, be relied upon *vis-à-vis* States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2 . . .⁵

A considerable number of such general declarations has been made in the past.⁶

The point about the Security Council Resolution 9 procedure is that it establishes a system of Optional Clause declarations for non-parties, in identical terms to that established for States parties to the Statute, but in which declarations are

¹ Art. 36 (1) continues . . . 'and all matters specially provided for in the Charter . . . or in treaties or conventions in force' (emphasis added).

² *P.C.I.J.*, Series A, No. 15 (1928), at pp. 22-3. Cf. *Corfu Channel* case (*Preliminary Objections*), *I.C.J. Reports*, 1948, p. 15 at p. 27.

³ *Nuclear Tests* case, *I.C.J. Reports*, 1974, p. 253 at pp. 327, 348-56 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, Waldock), where there is a full discussion of the principle.

⁴ Cf. *Electricity Company of Sofia* case, *P.C.I.J.*, Series A/B, No. 77 (1939), at p. 76.

⁵ S.C. Res. 9 (I), 15 October 1946; Rosenne, *op. cit.* (above, p. 63 n. 3), p. 872. For the Report of the Rapporteur of the Committee of Experts (emphasizing the requirement of explicit agreement) see S/169, *Security Council, Official Records*, 1st year, 2nd series, Supplement No. 6 at p. 154. For the brief debate, see *ibid.*, 76th meeting, 15 October 1946, pp. 466-8.

⁶ Under the equivalent League of Nations procedure, general declarations were made by Monaco and Liechtenstein: *ibid.*, at p. 466. Eight States have made general declarations under S.C. Res. 9 (I): *Yearbook of the International Court of Justice*, 1977-8, p. 35. See further Rosenne, *op. cit.* (above, p. 63 n. 3) pp. 278-84.

not opposable to the latter in the absence of 'explicit agreement'. A party to the Optional Clause could accept in advance a declarant State under Resolution 9, or could institute proceedings against that State in accordance with the terms of their declarations, or could accept a case brought against it by such a State.

Even if the Lauterpacht view is correct as to Article 36 paragraph 2, it seems to follow that an automatic reservation is not void: it is in law an Article 36 paragraph 1 procedure which is intended to have effect *vis-à-vis* parties to the Optional Clause, but which requires the latter's consent or acceptance to operate as such. Once again, this view fits precisely the position in the *Norwegian Loans* case, with its emphasis on the parties' acceptance of their declarations as the basis for the jurisdiction of the Court.¹

5. CONCLUSIONS

There are, then, three different routes by which it can be concluded that automatic reservations are capable of supporting, *pro tanto*, the jurisdiction of the Court under Article 36. If treaty reservation rules are to be applied, then the general acquiescence of States parties in the making of automatic reservations would appear to be effective, under the customary equivalent of Article 20 of the Vienna Convention, to make automatic declarants parties to the Optional Clause, unless the Court would be prepared to substitute a contrary view of its object and purpose. It has shown little inclination to do so.

Secondly, if ordinary principles of *vires* are to be applied, it is arguable that the automatic reservation has come to be accepted in practice as a permissible reservation to the Optional Clause, thus constituting so far as necessary an interpretation by subsequent practice of Article 36 paragraph 2.

Thirdly, even conceding the failure of both these arguments, it does not follow that automatic declarations are simply void. Article 36 paragraph 2 is not an exclusive means of access to the Court by unilateral declaration, and there is already a model, in the Security Council Resolution 9 procedure, for a set of 'Optional Clause' declarations which will have effect *vis-à-vis* 'genuine' declarations only when accepted as such, either *ad hoc* or generally. Examples of such acceptance would include the making of a similar reservation oneself, or a clear invocation of the reservation in an opponent's declaration. Whether acceptance could be implied from mere non-objection is more doubtful.² However this may be, the proper conclusion to Lauterpacht's argument on the 'obligation' point, even if its premisses are accepted in full, is that automatic reservations are not void but simply non-opposable to non-consenting States. And Greig has pointed out the advantages for States of accepting automatic reservations on their own terms, rather than rejecting them *in limine*.³

Finally, it should be said that this third view is not equivalent to recourse to

¹ Above, p. 66 n. 6 and p. 83 n. 1.

² For reliance on other jurisdictional objections as acceptance, cf. above, pp. 70-1. For the problem of non-appearance of a State see above, p. 71 n. 3.

³ Op. cit. (above, p. 63 n. 3), p. 653. Cf. Shihata, op. cit. (above, p. 63 n. 3), p. 295.

forum prorogatum.¹ Three differences between them may be mentioned. In the first place, if an automatic declaration is accepted by a party to the Optional Clause for the purposes of contentious proceedings, the other reservations in the two declarations remain relevant. Such acceptance is not the same as accepting the Court's jurisdiction over the merits (which is what is required for a *forum prorogatum*).² Secondly, in such a case the 'doctrine of successive acts', which has been developed for cases of *forum prorogatum*,³ will have no application. And, thirdly, it may be proper for the Court to indicate interim measures of protection, and take other preliminary steps in the action, on the basis of an automatic declaration,⁴ steps which would not be possible simply on the basis of an anticipated *ad hoc* acceptance of jurisdiction.

¹ But cf. Waldock, this *Year Book*, 31 (1954), pp. 96-142 at p. 133. On *forum prorogatum* see generally Rosenne, *op. cit.* (above, p. 63 n. 3), pp. 344-63; Soubeyrol, *Revue générale de droit international public*, 76 (1972), pp. 1098-104.

² *Anglo-Iranian Oil Co. case (Jurisdiction)*, *I.C.J. Reports*, 1952, p. 93 at p. 114.

³ Rosenne, *op. cit.* (above, p. 63 n. 3), pp. 352-6.

⁴ It is submitted that, if the basis for indicating interim measures is that a *prima-facie* case for jurisdiction can be made out, this is satisfied in a case where an automatic declaration is the basis for jurisdiction if (and only if) the reservation has not been clearly invoked. But the Court's approach in the *Interhandel* case (*Interim measures of protection*), *I.C.J. Reports*, 1957, p. 105, may indicate a less rigorous requirement than this. There the Court considered the merits of a claim for interim measures despite the express invocation by the United States of its automatic reservation. However, interim measures of protection were denied on other grounds, so the decision may not be formally inconsistent with the view suggested here. For further comment see Mendelson, this *Year Book*, 45 (1971), pp. 259-322 at pp. 274-8.

THE OPTIONAL CLAUSE TODAY*

By J. G. MERRILLS¹

Writing in this *Year Book* almost 25 years ago,² Professor Waldock reviewed the scope of Article 36 (2) of the Statute of the International Court in the light of modern State practice. The title of his paper, 'Decline of the Optional Clause', reflected its thesis, that the disappointingly small number of current declarations, together with the tendency of States to qualify their acceptances of the Court's jurisdiction with far-reaching reservations, rendered the ideal of a general system of compulsory adjudication increasingly remote. Whilst acknowledging that both the reluctance to deposit declarations under Article 36 (2) and the devising of ingenious expedients to restrict the effect of such declarations could be explained by the tactical advantage enjoyed by States which chose to remain outside the system, Professor Waldock suggested that a continuation of current trends might bring the Optional Clause into disrepute and produce a further significant decline in the scope of the Court's compulsory jurisdiction.

The object of the present article is to consider whether such a decline has occurred and to explore the implications for the future of the Optional Clause of the latest tendencies in the practice of States. Thus the aim is to review the present scope of the Optional Clause system, but not the use which States make of the Court, suggestions for increasing its business, or the question of reforms in its practice or procedure, all of which have been extensively discussed elsewhere.³

Before examining the current situation it may be useful to outline the provisions of the Statute relating to the compulsory jurisdiction and to sketch the way in which they have been interpreted in practice.

THE OPTIONAL CLAUSE IN THEORY AND IN PRACTICE

Article 36 (2) of the Statute of the Court provides that:

The States parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;

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² Waldock, this *Year Book*, 32 (1955-6), p. 244 (hereinafter 'Waldock').

³ See, for example, Jenks, *The Prospects of International Adjudication* (1964); Franck, *The Structure of Impartiality* (1968); David Davies Memorial Institute, *International Disputes: The Legal Aspects* (1972); Mosler and Bernhardt (eds.), *Judicial Settlement of International Disputes* (1974); and Gross (ed.), *The Future of the International Court of Justice* (1976).

- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

This provision, which is generally, though inaccurately,¹ known as the 'Optional Clause', is only one of the ways in which States may confer jurisdiction on the Court. Historically, the 'treaties or conventions in force' referred to in Article 36 (1) have been a more important source of jurisdiction for both the present Court and its predecessor. Nonetheless, the record indicates that whilst the importance of general or specific treaty arrangements has always been recognized, a key role in the development of international adjudication was also envisaged for declarations under Article 36 (2).

When the Permanent Court was founded in 1920 the majority of States wished to institute a comprehensive system of compulsory jurisdiction. How the Optional Clause was devised as a compromise between that arrangement and the system of *ad hoc* submission favoured by the Great Powers has often been described.² All that need be said here is that when the present Court was set up in 1945 a very similar debate produced almost exactly the same result. It is clear from the proceedings at San Francisco that the retention of Article 36 (2) with only very minor modifications, together with the decision to ensure that acceptances of the jurisdiction of the Permanent Court were maintained in force by Article 36 (5), indicated general approval of that Court's practice.

An important aspect of that practice concerned the question of reservations. Here the Permanent Court had already provided the answers to two important questions of principle: the extent to which reservations to declarations under Article 36 (2) were permissible and the effect of any reservations that might be made.

Reservations and conditions are expressly dealt with in Article 36 (3) of the Statute which provides that:

The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

As Professor Waldock has explained,³ the authorization of declarations made 'on condition of reciprocity on the part of several or certain States' was inserted with the sole objective of accommodating the Brazilian member of the 1920 Committee of Jurists, who desired that the Statute permit a declaring State to make its acceptance of the Court's jurisdiction conditional upon a similar acceptance

¹ The original 'Optional Clause' was a special protocol attached to the 1920 Protocol of Signature of the Statute of the Permanent Court. It was designed to provide a suggested form for the declarations referred to in Article 36 (2). Because the Statute of the present Court is an integral part of the Charter, it contains no protocol of signature, but provides in Article 36 (4) for declarations to be deposited with the Secretary-General of the United Nations. There is therefore no longer an Optional Clause in the old sense, and the term is now used to refer to Article 36 (2) itself.

² See, for example, Anand, *Compulsory Jurisdiction of the International Court of Justice* (1961), Ch. 2.

³ Waldock, p. 255.

by one or more of the Great Powers. As might be expected, this condition has proved to be of negligible significance and the Brazilian declaration of 1 November 1921 is the only example of its use. By contrast, the other condition mentioned in Article 36 (3), that declarations may be made 'for a certain time', concerns the critical issue of duration and, for reasons that will be considered later, has proved to be a major source of controversy.

Despite the limited possibilities offered by Article 36 (3), it was soon apparent that States felt the need to introduce other kinds of reservations. As early as 1921 the Netherlands deposited an acceptance of Article 36 (2) limited to future disputes and excluding disputes in regard to which the parties had agreed to use some other means of peaceful settlement. Other States soon followed this example. Though many declarations were made unconditionally, others were accompanied by substantial and sometimes controversial reservations. The British declaration of 1930,¹ for example, which sought to circumscribe the Court's jurisdiction in a number of original ways, was strongly criticized by Lauterpacht,² but also widely imitated.

The increasing use of reservations not specifically authorized by the Statute was endorsed by the League of Nations, which went so far as to point out the permissibility of reservations in an effort to encourage acceptances of the Court's jurisdiction.³ The Permanent Court took a similar view and when in the *Phosphates in Morocco* case⁴ its jurisdiction was invoked on the basis of a French declaration limited to disputes 'which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification',⁵ and an Italian declaration conditional upon a previous attempt to settle the dispute by diplomatic means, neither the legality of these limitations, nor the French right to dispute the Court's jurisdiction by invoking both limitations, were questioned.

The *Phosphates in Morocco* case was the first case in which the effect of reservations to declarations under Article 36 (2) was discussed. According to the Statute such declarations are made 'in relation to any other State accepting the same obligation'. This does not, of course, mean that the Court will have jurisdiction only in the unlikely event of the declarations of the plaintiff and defendant States being identical in all respects. Rather, following the arrangements for compulsory arbitration proposed at The Hague Peace Conference of 1907, the intention was to limit the Court's jurisdiction to matters common to the declarations of both parties and, as a corollary, to allow each to take advantage of any reservations in the other's declaration.⁶

There was some discussion of this reciprocity principle in the *Phosphates in Morocco* case, but that case was decided on the basis of the reservation *ratione temporis* contained in the defendant's declaration, and the significance of the

¹ Unless otherwise indicated, the date given for any declaration subject to ratification is the date of ratification.

² H. Lauterpacht, *Economica*, 10 (1930), p. 137. For a less critical view see Fischer Williams, this *Year Book*, 11 (1930), p. 63.

³ Waldock, p. 248.

⁴ *Phosphates in Morocco*, Judgment, *P.C.I.J.*, Series A/B, No. 74 (1938), p. 10.

⁵ Translation.

⁶ Waldock, pp. 255-7.

Belgian reservation was not examined. Reciprocity was, however, directly in issue the following year in the *Electricity Company of Sofia and Bulgaria* case.¹ There the defendant State, Bulgaria, had deposited an unconditional acceptance of the Optional Clause, but the declaration of the plaintiff State, Belgium, contained a limitation *ratione temporis*. In allowing Bulgaria to object to the jurisdiction on the basis of the Belgian limitation the Court observed that:

Although this limitation does not appear in the Bulgarian Government's own declaration, it is common ground that in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Bulgarian declaration, it is applicable between the parties.²

This view has been endorsed by the present Court in a number of its judgments³ and it is clear that, though its implications are by no means uncontroversial, the reciprocity principle lies at the heart of the present system of compulsory jurisdiction.

At the time of Professor Waldock's study thirty-three States⁴ had made declarations under the Optional Clause. Since 1955 five of these declarations have lapsed or have been terminated without renewal.⁵ In addition in 1960 the Registry of the Court ceased to record the 1933 declaration of Paraguay, the status of which had been in doubt since 1938.⁶ These six losses have, however, been more than compensated for by the deposit of eighteen new declarations, so that the number of declarations now stands at forty-five.

With these additions the geographical distribution of the declarations now in force has changed significantly. New Zealand, Australia and Israel have all renewed their declarations. The small Asian group has doubled in number with Democratic Kampuchea (Cambodia), Japan and Mauritius joining India, Pakistan and the Philippines. The strong European contingent of nine States has been reinforced by the addition of Finland, Malta and Austria and the decision by Belgium to revive an acceptance of the Court's jurisdiction which had lapsed in 1953. The European group is now the largest, having overtaken the American group, where Costa Rica's declaration of 1973 has been the only addition to the eleven States which have maintained or renewed their declarations. The most dramatic development, however, has been the number of new declarations from Africa. South Africa and Liberia were the only representatives of the continent in 1955. Today eleven African States have declarations in force.⁷

¹ *Electricity Company of Sofia and Bulgaria*, Judgment, *P.C.I.J.*, Series A/B, No. 77 (1939), p. 64.

² *Ibid.*, p. 81.

³ See Rosenne, *The Law and Practice of the International Court* (1965), pp. 384-8 (hereinafter 'Rosenne').

⁴ The thirty-two States whose declarations are set out in the *Yearbook* of the Court for 1954-5, plus Portugal whose declaration was deposited on 19 December 1955.

⁵ The declarations of China, France, South Africa, Thailand and Turkey. The present study is based on the situation recorded in the *Yearbook* of the Court for 1977-8, together with the extension of the declaration of El Salvador, notified on 24 November 1978.

⁶ See Fachiri, this *Year Book*, 20 (1939), p. 52.

⁷ This number includes the 1957 declaration of Egypt which covers only legal disputes arising under paragraph 9 (b) of Egypt's *Declaration on the Suez Canal and the Arrangements for its Operation*, 24 April 1957. Doubt has been expressed as to whether, in view of its limited

Thirteen of the declarations examined in Professor Waldock's study are still in force, including seven acceptances of the jurisdiction of the Permanent Court, maintained in force by Article 36 (5).¹ Of the fourteen States which have renewed declarations since 1955, three have done so twice,² one has done so three times³ and the United Kingdom, having changed its declaration twice in that year, has deposited new declarations on four subsequent occasions.⁴

States' tendency to up-date their declarations from time to time, taken together with the accession of so many new recruits to the Optional Clause system, has created a situation in which the bulk of the declarations currently in force are relatively recent. Whilst four States maintain declarations that have been unchanged for fifty years or more,⁵ one-fifth of the current declarations have been in force for less than ten years and more than two-thirds for less than twenty-five.

Whether the Optional Clause has continued its decline in the period under review is a matter of some complexity. Consideration of the number of declarations in force as a proportion of the States eligible to make them suggests that the decline has continued. In 1955 the declarations in force represented approximately 40 per cent of the seventy-six members of the United Nations. Today, that figure has fallen to 30 per cent of an organization that has doubled in size. To see whether this proportionate decline has been accompanied by a deterioration in the terms on which the Court's jurisdiction has been accepted will be the concern of what follows.

TERMINATION AND VARIATION OF DECLARATIONS

(a) *Termination*

Article 36 (3) of the Statute, it will be recalled, provides that declarations may be made 'unconditionally . . . or for a certain time'. The early acceptances of the jurisdiction of the Permanent Court, including several that are still in force, contained no time limits. In 1930, however, the United Kingdom and five Commonwealth States⁶ accepted the Court's jurisdiction 'for 10 years and thereafter until such time as notice may be given to terminate the acceptance'. Acceptance of the Court's jurisdiction for a fixed period clearly amounted to a declaration 'for a certain time' (*pour un délai déterminé*) within Article 36 (3) and as such was

subject-matter, this is properly regarded as a declaration under Article 36 (2); see Rosenne, p. 371.

¹ The seven States concerned are: Colombia, the Dominican Republic, Haiti, Luxembourg, Nicaragua, Panama and Uruguay. All were founder members of the United Nations with the result that the Court's decision in the *Israel v. Bulgaria Aerial Incident* case, *I.C.J. Reports*, 1959, p. 127, has no bearing on the validity of their declarations under Article 36 (5). See also *Temple of Preah Vihear, Preliminary Objections*, Judgment, *I.C.J. Reports*, 1961, p. 17.

² Norway in 1956 and 1976, Pakistan in 1957 and 1960, El Salvador in 1973 and 1978.

³ India in 1956, 1959 and 1974.

⁴ In 1957, 1958, 1963 and 1969. On the legal effects of successive declarations see Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (1960), pp. 59-63 (hereinafter 'Rosenne, *Time Factor*').

⁵ The Dominican Republic, Haiti, Panama and Uruguay.

⁶ Australia, Canada, India, New Zealand and South Africa. The declaration of the Irish Free State was for a fixed period of twenty years.

unobjectionable. But the provision for continuation after the ten-year period had significant implications. It meant that at a future date the declaration of the United Kingdom and all declarations couched in similar terms would be terminable with immediate effect. It also suggested the possibility of dispensing with the fixed period altogether and making a declaration terminable from the moment of its deposit.¹

In 1940 the British and Commonwealth declarations duly became terminable on notice and in the same year South Africa deposited a new declaration terminable on immediate notice. By 1955 the seriousness of these developments was apparent. Two more States had deposited declarations terminable on immediate notice, four declarations had become so terminable through lapse of time and a number of other declarations would shortly fall into the same category.

This was clearly a most undesirable development. As Professor Waldock pointed out,² a State with a declaration terminable on notice enjoys a grotesque advantage *vis-à-vis* other parties to the Optional Clause. Although the Court's decision in the *Nottebohm* case³ means that denunciation of a declaration cannot deprive the Court of jurisdiction in a case of which it is already seised, this puts a premium on the premature initiation of litigation, whilst the option of immediate denunciation is in any case incompatible with a resolute commitment to the Court's jurisdiction. Developments in the last quarter century have shown Professor Waldock's apprehension to be well founded.

The forty-five declarations currently in force fall into three groups. The number of declarations with time provisions effectively restricting termination has fallen from eighteen to thirteen. The four Scandinavian States, together with the Netherlands and Luxembourg, have declarations which are automatically renewed for successive five-year periods, unless notice of termination is given not less than six months before the expiration of the current period. The declaration of Costa Rica is the same without the six months' requirement. The declaration of New Zealand is for an initial period of five years, until 22 September 1982, and will thereafter be terminable on six months' notice. The declarations of Switzerland and Liechtenstein are terminable on one year's notice and those of Mexico and the United States on six months' notice. The declaration of El Salvador is for a fixed ten-year period and will then lapse.⁴

The number of declarations containing no provision for termination has risen from eight to twelve. This is a surprising development because the question of how such declarations may be terminated is still a matter of some controversy. Waldock's view is that in this respect such declarations are subject to the law of treaties and so in effect may only be terminated in accordance with the doctrine of *rebus sic stantibus*.⁵ If this view is correct, it seems fair to assume that the matter is now governed by Article 62 of the 1969 Vienna Convention on the Law of Treaties.⁶ Rosenne, on the other hand, takes the view that to invoke the law of

¹ Waldock, p. 269.

² Waldock, pp. 266-8.

³ *Nottebohm, Preliminary Objection*, Judgment, *I.C.J. Reports*, 1953, p. 111.

⁴ The declaration is due to expire on 26 November 1988.

⁵ Waldock, pp. 263-5.

⁶ In accordance with the views expressed by the Court in the *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court*, Judgment, *I.C.J. Reports*, 1973, p. 3 at pp. 18-22.

treaties exaggerates the consensual aspects of the Optional Clause and regards the issue as largely theoretical.¹

In one sense the view that this is not a practical problem is almost certainly correct. In 1939 the United Kingdom, the other Commonwealth States and France sought to modify their declarations under Article 36 (2) by introducing a reservation to cover disputes arising out of events occurring during the War. Since all the declarations in question had some little time to run, a number of States made reservations in respect of these modifications.² It is difficult to believe, however, that if the matter had been tested, the doctrine of *rebus sic stantibus* could not have been successfully invoked. Similarly, the political upheavals of the last fifty years make it extremely unlikely that a successful challenge could be mounted to the right of a State to denounce an early acceptance of the jurisdiction of the Permanent Court, even if strict compliance with the law of treaties were required. As already mentioned, in 1960 the Registry ceased to record Paraguay's declaration which had been denounced in controversial circumstances in 1938, and in 1973 El Salvador replaced her declaration of 1921 in apparent reliance on the doctrine of *rebus sic stantibus*.³ In neither case was there any reaction from other States. But six declarations without time limits have been made since 1955,⁴ and the pursuit of recent claims before the Court in the face of clear evidence that the defendant State was both unwilling to appear and unlikely to implement an adverse verdict suggests that it is by no means 'politically inconceivable'⁵ that a State's right to denounce such a declaration may some day be challenged.

However this may be, a more immediate problem is posed by the third and largest group of declarations, those terminable on notice. As we have seen, there were seven such declarations in 1955. There are now twenty. Fourteen of this group have been made in the last twenty-five years and are expressly stated to be terminable on notice. The remaining six declarations have been tacitly renewed after an initial fixed period of validity and so are now effectively terminable on notice.

The damaging effect of instantaneously terminable declarations is now incontrovertible. In 1951 Iran terminated her declaration of 1932 in response to the Court's order for interim measures of protection in the *Anglo-Iranian Oil Company* case. India terminated her declaration of 1940 following the application in the *Right of Passage* case and later substituted a new and more restrictive declaration. In 1974 France severed a long-standing association with the Court following the Order for interim measures of protection in the *Nuclear Tests* cases, and in the same year India further restricted her declaration by revising her reservation *ratione temporis*, extending her exclusion of disputes arising out of hostilities and incorporating a new reservation designed to prevent an opponent

¹ Rosenne, pp. 415-18.

² Rosenne, *Time Factor*, pp. 24, 25.

³ In a lengthy preamble the 1973 declaration referred *inter alia* to the promulgation of new political constitutions, the adoption of the United Nations Charter and the Charter of the Organization of American States and 'the texts of similar declarations made by other States Members of the United Nations'.

⁴ By Botswana, Egypt, Honduras, Malawi, Nigeria and Uganda.

⁵ Rosenne, p. 417.

from relying on the General Act of 1928, changes which were apparently a response to the proceedings instituted by Pakistan in the *Prisoners of War* case.

The above actions, though serious enough, all followed the initiation of litigation and thus had no effect on the proceedings in question. In 1954, however, Australia terminated her current declaration in order to introduce a reservation covering her dispute with Japan over pearl fisheries,¹ and in 1955 the United Kingdom devised a novel form of reservation with the apparent aim of preventing proceedings in respect of the *Buraimi* arbitration.² In 1957 the British declaration was again amended so as to preclude any challenge to British nuclear weapons testing.³ And the Canadian declaration of 1970 featured a new reservation with the aim of keeping the controversy over the Arctic Waters Pollution Prevention Act from the Court.⁴

(b) *Variation*

The increasing recourse to declarations terminable on notice has been accompanied by another no less significant development. In 1955 Portugal deposited an acceptance of the Optional Clause which reserved the right:

... to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary General of the United Nations and with effect from the moment of such notification.

This type of reservation is clearly open to exactly the same objections as a provision for termination on immediate notice. Particular interest therefore attaches to the Court's handling of the Indian challenge to it in the *Right of Passage* case.⁵

In her First Preliminary Objection India argued that Portugal's reservation was incompatible with the object and purpose of the Optional Clause and that it therefore invalidated the declaration of 19 December 1955 accepting the Court's jurisdiction. India argued, first, that the reservation was intended to be retro-active, so that a variation of the terms of Portugal's declaration could be used to deny the jurisdiction of the Court in a case of which it was already seised. Portugal denied that the reservation was intended to have this effect and the Court agreed. Citing the *Nottebohm* case, the Court held that whether the total or a partial denunciation of an acceptance was in issue, the Court could never be

¹ See Taoka, *Japanese Annual of International Law*, 1959, p. 1 at pp. 8, 9.

² It is instructive to compare this action with Sir John Fischer Williams's expectation that 'no British Government . . . would suddenly terminate its acceptance of the Clause when threatened by an unwelcome reference to the Court': this *Year Book*, 11 (1930), p. 75.

³ The reservation, since abandoned, covered 'disputes . . . relating to any question which, in the opinion of the Government of the United Kingdom affects the national security of the United Kingdom or any of its dependent territories'. For comment see Briggs, *Recueil des cours*, 93 (1958-I), p. 223 at pp. 302, 303 (hereinafter 'Briggs').

⁴ See the statement of Prime Minister Trudeau to the Canadian House of Commons reported in H.C. Deb. (Can.), 1970, 8 April, at cols. 5623-4, also in *International Legal Materials*, 9 (1970), p. 610.

⁵ *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports*, 1957, p. 125.

divested of jurisdiction retrospectively and that the Portuguese reservation must be construed accordingly.¹

India's next argument was that the reservation created too much uncertainty as to the reciprocal rights and obligations of other signatories. This argument was also rejected on the ground that though the future actions of the accepting government might be uncertain, there was no difficulty in ascertaining the reciprocal obligations of the parties at the time of submission of a case to the Court.² The Court added that as far as uncertainty was concerned, the Portuguese declaration was indistinguishable from declarations terminable on immediate notice, of which, of course, India's was one.

The final Indian argument in support of her First Preliminary Objection was that the reservation violated the element of reciprocity underlying the Optional Clause because it claimed for Portugal a right which was denied to States which failed to reserve such a right. This was rejected on the ground that any variation introduced by Portugal could be invoked by other States and that since the obligations of all the parties were thus identical at any given time, the requirement of Article 36 (2) that States accept the 'same obligation' was fulfilled.³

India's Second Preliminary Objection concerned the timing of Portugal's application, which had been filed only three days after the deposit of her acceptance of the Court's jurisdiction. India's argument here was that the Portuguese application violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause because the application had been filed before copies of the Portuguese declaration could have been transmitted by the Secretary-General to the other parties to the Statute in accordance with Article 36 (4). The Court rejected this objection and held that the words '*ipso facto* and without special agreement' in Article 36 (2) implied that no time at all need elapse between the deposit of a declaration and the filing of an application and that even an application filed on the same day would in no way violate the provisions of the Statute.⁴

India's Fourth Preliminary Objection advanced the same argument with particular reference to Portugal's reservation of the right to vary her declaration on notice. India's argument here was that the filing of Portugal's application had so quickly followed the deposit of her declaration that India had been denied the opportunity to invoke Portugal's reservation and amend her own declaration so as to exclude the dispute before the Court.

In rejecting this objection the Court reiterated the views it had expressed in rejecting India's Second Preliminary Objection and held that since the Statute prescribed no interval between the deposit of a declaration and the filing of an application, no denial of any rights based on reciprocity had occurred.⁵ Professor Briggs has suggested that this conclusion, seen in relation to the Court's emphasis on the filing of the application as the critical date for determining the parties' respective obligations, amounted to an implicit rejection of the view that the effect of the Portuguese reservation was to give India not only the right to rely on

¹ Ibid., p. 142.

² Ibid., p. 143.

³ Ibid., p. 144.

⁴ Ibid., pp. 145-7.

⁵ Ibid., pp. 147-8.

any variations introduced by Portugal, but also the right to introduce any variations of her own.¹ This was certainly Portugal's argument and such a view of the limitations of reciprocity has much to commend it. However, the two brief paragraphs in which the Court dismissed India's Fourth Preliminary Objection are far from explicit on the point.

It is clear that in upholding the Portuguese reservation the Court established at least three important propositions. First, no violation of the reciprocity principle is committed by the filing of a precipitate application. Secondly, the reservation of a right to vary a declaration (and incidentally of the right to denounce a declaration) is lawful. Thirdly, any attempt to make such reservations retrospective would violate the *Nottebohm* principle and must be regarded as incompatible with the Statute.

Twelve States have now followed Portugal's example and currently reserve a right to vary the terms of their declarations. Eight of these reserve a similar right to terminate. Of the others, the reservations of Norway and New Zealand are limited to the special question of disputes settlement in the law of the sea. Botswana and Malawi are States with no provision on termination and El Salvador's declaration, as we have seen, is for a fixed ten-year period.

If to the group of twenty declarations terminable on notice we add the three States which have reserved a general right to vary the terms of their declarations instead, it can be seen that today no less than twenty-three declarations, or more than half the current total, contain a commitment to the Court's jurisdiction of uncertain duration.

OBLIGATIONS *RATIONE TEMPORIS*

The restriction of the Optional Clause obligation to disputes arising after a particular date was one of the first reservations to be incorporated in a declaration under Article 36 (2). In 1955 about half the declarations in force contained such a reservation and today the situation is broadly similar.² These limitations *ratione temporis* are evidently intended to fulfil a number of distinct objectives. The first, and most obvious, is to prevent the litigation of stale disputes, or the reopening of ancient controversies. Thus the 1956 declaration of the Netherlands is limited to disputes arising after 1921, and the United Kingdom declaration of 1969 substituted 24 October 1945 for 5 February 1930, the date to be found in the 1963 declaration.

A second objective is to keep from the Court disputes arising from a particular period of national history. The clearest illustration of this use of limitations *ratione temporis* is provided by the choice of a limiting date which excludes disputes arising out of events before independence. As might be expected, reservations of this type are found in several declarations deposited in the period under review.³ The desire to enter the international arena without an incubus of

¹ Briggs, pp. 256-7. See also Rosenne, pp. 373, 374 and 388, 389.

² Eighteen declarations currently contain such a limitation.

³ For a discussion of the significance of these limitations and the practice of States after the First World War see Rosenne, *Time Factor*, pp. 57-9.

boundary or other disputes from the colonial period makes this unwillingness to litigate entirely comprehensible and the limitation dates in the declarations of Pakistan (1948), Kenya (1963) and Malawi (1966) can all be explained in this way.

Wars and revolutions are other events it may be thought desirable to exclude. As we shall see, these are often covered by express reservations. Occasionally, however, limitations *ratione temporis* may be employed with the same objective. In 1955 the United Kingdom declaration was modified to exclude disputes arising during the period of the Second World War.¹ The updating of the British declaration has made this reservation unnecessary and the only example of such a reservation among the declarations currently in force is the Israeli exclusion of disputes arising out of the events occurring between 15 May 1948 and 20 July 1949, the period of the war of independence. As the Israeli declaration is in any case limited to disputes concerning situations or facts arising after 25 October 1951, it seems that the specific provision to cover the earlier period was inserted *ex abundante cautela*.²

The third and final function of limitations *ratione temporis* is to ensure that only future events, that is events subsequent to the declaration, can be the subject of the Court's compulsory jurisdiction. When the declaration closely follows the attainment of sovereignty, as in the cases already mentioned, this kind of limitation is unobjectionable. It is otherwise, however, in the case of established States. Here the limitation has the effect of drastically reducing the scope of the compulsory jurisdiction and, when combined with the right to vary or terminate the declaration without notice, must bring into question the seriousness of a State's commitment to the Court.

It is true, of course, that the effect of such limitations diminishes with time. The declarations of Japan and Finland, for example, are now more than twenty years old, those of Mexico and the United States more than thirty, and Luxembourg's declaration was made as long ago as 1930. Obviously in these cases the use of the date of the declaration as a limitation *ratione temporis* is now no more significant than the arrangements made by other States for the exclusion of stale claims. However, two recent declarations indicate the undesirability of this type of limitation. By using the date of the declaration as the limiting date, India's declaration of 1974 and Canada's of 1970 at a stroke reduced the period subject to the Court's jurisdiction by twenty-four and forty years respectively. Professor Macdonald's criticism of these drastic developments is surely justified.³ Bearing in mind that all such limitations have a reciprocal effect, it is greatly to be hoped that when some of the older declarations are renewed, new limitations *ratione temporis* will not follow these examples.

The general effect of limitations *ratione temporis* is to prevent the compulsory litigation of issues based on facts prior to the chosen date by either the declaring State or its opponent. Conversely, States which do not make use of this form of

¹ The reservation covered 'disputes arising out of events occurring between the 3rd of September, 1939 and the 2nd of September, 1945'.

² But see Meron, *Israel Law Review*, 4 (1969), p. 307 at p. 328 (hereinafter 'Meron').

³ Macdonald, *Canadian Yearbook of International Law*, 8 (1970), p. 1 at pp. 25, 26 (hereinafter 'Macdonald').

limitation enjoy no such protection, though they can, of course, take advantage of any limitation in an opponent's declaration. The Portuguese declaration is unique in making this point explicitly by stating that 'the present declaration covers disputes arising out of events both prior and subsequent to the declaration of acceptance of the "optional clause" which Portugal made on 16 December 1920 . . . '.

Where limitations *ratione temporis* are employed their form may be no less important than the critical date. The declarations currently in force employ a number of different formulae. The simplest limits the declaration to legal disputes (or in the case of the Netherlands simply to 'disputes') arising after the chosen date. The declaration of Pakistan, for example, covers '. . . all legal disputes after 24 June 1948, arising, concerning . . .'. Substantially similar words are to be found in a number of other declarations.¹ Limitations in this form require the Court only to ascertain the date of the dispute. This is not as simple as it may seem. The very existence of a dispute is frequently an important issue of admissibility and, even when it is not, the date at which it arose may pose a number of problems.² The most recent authority on the application of this type of limitation is still the decision of the Court in the *Interhandel* case,³ which raised a number of questions about the scope of the United States' declaration.

The first question was when the disputes over the assets of Interhandel and the related issue of the United States' obligation to submit the issue to arbitration arose. The jurisdiction of the Court was founded on the Swiss and American declarations under the Optional Clause. The former contained no limitation *ratione temporis* and so the crucial date was 26 August 1946, the limitation date specified in the United States' declaration. Although the Swiss and American authorities had held various discussions concerning the assets of Interhandel in 1945, 1946 and 1947, the Court decided that the current dispute did not arise until 26 July 1948, the date on which the United States first rejected the Swiss request for restoration of the company's assets. Since the dispute concerning the obligation to arbitrate could only have arisen after the principal dispute, both branches of the First United States' Preliminary Objection were rejected.⁴

The Second Preliminary Objection raised an important issue of reciprocity. The United States argued that even if the dispute arose after the date of her declaration, so long as it arose before 28 July 1948, the date of the entry into force of the Swiss declaration, it fell outside the Court's jurisdiction. This, it was argued, was because the United States was reciprocally entitled to import into the Swiss declaration her own limitation *ratione temporis*.⁵ This argument too was rejected. It could have no application to the obligation to negotiate because this did not arise until 1957. More importantly, it was fundamentally misconceived.

¹ The declarations of the Netherlands and the United States are in this form and the special Egyptian declaration of 1957 is substantially similar.

² For a penetrating analysis of this issue see Rosenne, *Time Factor*, pp. 45-9.

³ *Interhandel*, Judgment, *I.C.J. Reports*, 1959, p. 6.

⁴ *Ibid.*, pp. 20-2.

⁵ The argument here resembled an argument raised by France in the *Phosphates in Morocco* case, but not discussed by the Court: see Briggs, pp. 247-9.

As the Court observed in a passage which neatly summarizes both the scope and the limitations of the reciprocity principle:

Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration. For example, Switzerland, which has not expressed in its Declaration any reservation *ratione temporis*, while the United States has accepted the compulsory jurisdiction of the Court only in respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th, 1946. This is the effect of reciprocity in this connection. *Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.*¹

In rejecting the First United States' Preliminary Objection in *Interhandel* the Court observed that 'the facts and situations which have led to a dispute must not be confused with the dispute itself'² and indicated that in applying the United States' declaration the date of the dispute was the only relevant factor. To avoid this result, twelve of the declarations currently in force use a more elaborate formula than that involved in *Interhandel*, and whilst setting the Court a correspondingly more exacting task, more severely circumscribe the scope of its compulsory jurisdiction.

The United Kingdom declaration accepting the Court's jurisdiction 'over all disputes arising after 24 October 1945, with regard to situations or facts subsequent to the same date . . .' may be regarded as typical. This type of limitation, termed by Meron the 'double exclusion formula',³ requires the Court to ascertain both the date of the dispute and the situations or facts from which it arose. As the commonest type of limitation *ratione temporis*, even in 1955, the double exclusion formula has received a good deal of judicial attention and the jurisprudence of both the present Court and its predecessor furnishes some useful examples of its application and the difficulties it may present.

In the *Right of Passage* case both aspects of the double exclusion formula were in issue. The Indian declaration of 1940, on the basis of which the Court's jurisdiction was invoked, employed the double exclusion formula and made 5 February 1930 the critical date. To ascertain whether the dispute arose after that date the Court first identified the three-fold subject of the dispute as the disputed existence of a right of passage in favour of Portugal, the alleged failure of India in July 1954 to comply with her obligations in respect of that right of passage and the redress of the illegal situation flowing from that failure. The Court then reasoned that, since the dispute could only arise when all its constituent elements were present, 1954 was the earliest date at which the dispute could be said to have arisen.⁴

¹ *I.C.J. Reports*, 1959, p. 23 (emphasis added).

² *Ibid.*, p. 22.

³ Meron, p. 327.

⁴ *I.C.J. Reports*, 1960, p. 34.

The next question was therefore whether the dispute concerned 'situations or facts' prior to 1930. Here too the Indian argument that the case fell outside the declaration was rejected. Pointing out that in the *Electricity Company of Sofia and Bulgaria* case the Permanent Court had drawn 'a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute',¹ the Court confirmed that, 'Only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court'.² The effect of this distinction in the present case was to make the critical fact the absence of any controversy over Portugal's alleged right of passage before 1954. Thus the fact that much of Portugal's case rested on historical material dating from well before 1930 was irrelevant:

. . . the condition to which the Court's jurisdiction is subject does not relate to the nature of the arguments susceptible of being advanced. The fact that a treaty, of greater or lesser antiquity, that a rule of international law, established for a greater or lesser period, are invoked, is not the yardstick for the jurisdiction of the Court according to the Indian Declaration. That Declaration is limited to the requirement that the dispute shall concern a situation or facts subsequent to 5 February 1930: the present dispute satisfies that requirement.³

The strict interpretation of the double exclusion formula in the *Right of Passage* case raised the question whether a still more comprehensive reservation *ratione temporis* might not be possible. In 1956 and again in 1959, a year before the Court's final judgment in the case, India deposited new declarations modifying her limitation *ratione temporis* only by the substitution of 26 January 1950 for the earlier date. When the declaration was renewed in 1974, however, two drastic changes were made. As already noted, the critical date was again changed, this time to 18 November 1974, the date of deposit of the declaration. Even more serious, however, was the inclusion of a quite new kind of limitation *ratione temporis*, inspired by the form of words to be found in the declaration of El Salvador deposited the previous year. The new declaration excludes 'disputes prior to the date of this declaration including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter'.

The connection between the elaborate formula to be found in the current Indian declaration and the rejection of the Indian arguments in the *Right of Passage* case is clear. Just as in *Interhandel* a more formidable American argument could have been made had the double exclusion formula been used, so in the *Right of Passage* case Portugal's need to establish her case by reference to historical material might have been highly relevant had the Indian reservation been framed in these far-reaching terms. To date only El Salvador and India employ this form of reservation and in the absence of any pronouncement from the Court its interpretation must be a matter of speculation. But the search for ever

¹ *I.C.J. Reports*, 1960, p. 35.

² *Ibid.*

³ *Ibid.*, p. 36.

more comprehensive formulae to exclude the Court's jurisdiction is certainly to be deplored.

A literal interpretation of this latest product of the draftsman's ingenuity suggests that its effect could be to reduce the compulsory jurisdiction of the Court almost to vanishing point. Disputes with no significant historical dimension are very rare in international law and whilst the *Interhandel* and *Right of Passage* cases suggest that the Court might seek to preserve its jurisdiction by applying the new limitation somewhat restrictively, it seems clear that, however interpreted, its effect must be to reduce the scope of that jurisdiction significantly. This effect is magnified when, as in the case of both India and El Salvador, the date of deposit of the declaration is also the critical date and when it is remembered that the new form of limitation can be invoked on a reciprocal basis.

OBLIGATIONS *RATIONE PERSONAE*

(a) *Surprise applications*

In the *Right of Passage* case, it will be recalled, the Court rejected India's argument that the Portuguese application had been premature and that the interval of only three days between the deposit of the declaration and the filing of the application violated India's right to equality, mutuality and reciprocity under Article 36 (2). Though the Court's decision was undoubtedly correct, it provided a striking illustration of the vulnerability of States which have accepted the Optional Clause and the tactical opportunities open to those which have not.

Two modifications in the practice of States might have been expected to follow. A further development of the practice of incorporating extensive reservations in declarations under Article 36 (2) offers one way of avoiding unpleasant surprises. As we shall see, the number and scope of such reservations have continued to grow, and the *Right of Passage* case may well have contributed to this development. As an answer to the problem of the surprise application, however, the drafting of ever more extensive reservations is both inadequate and clumsy; inadequate because the worst surprises are unforeseen and cannot be catered for in advance, clumsy because the reciprocal effect of new reservations diminishes the reserving State's own opportunities to refer disputes to the Court.

A better solution, as Professor Waldock suggested,¹ is a reservation with the specific objective of preventing the unscrupulous use of the Court. In 1955 there was no declaration incorporating such a reservation, but changes were not long in coming.

The French declaration of 1959 excluded:

... disputes with any State, which at the date of occurrence of the facts or situations giving rise to the dispute, has not accepted the compulsory jurisdiction of the International Court of Justice for a period at least equal to that specified in this declaration.²

The effect of this reservation was to exclude from the Court's jurisdiction disputes with States which at the critical time had not accepted the Court's jurisdiction for a period of at least three years. The next French declaration in

¹ Waldock, pp. 282-3.

² Translation. Emphasis added.

1966 was terminable at any time and modified the reservation by omitting the final phrase. Although the reservation may have provided some protection against surprise applications it was not copied and with the termination of the French declaration in 1974 is no longer a feature of current practice.

A reservation included in the British declaration of 1957 has proved to be of more lasting significance. This excluded:

. . . disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

This reservation has been incorporated in subsequent British declarations and, not surprisingly, is also to be found in the Indian declarations of 1959 and 1974. Five other States now include a similar reservation in their declarations¹ and it seems probable that its use will become increasingly common.

Since the effect of such a reservation will usually be to take away from a State outside the Optional Clause system an advantage it would otherwise enjoy, this development may seem unobjectionable. It must be remembered, however, that this effect depends on the defendant State's reserving and being prepared to exercise its power to amend or denounce its declaration. If therefore the parties are put on an equal footing, it is only because one deficiency in the system of compulsory jurisdiction can be exploited to counteract another.

Moreover, the reservation has yet to be applied by the Court and may give rise to difficulties. In particular, the question whether the jurisdiction of the Court has been accepted 'only in relation to or for the purposes of the dispute' may not be easily answerable. If the motive of a State in depositing a declaration becomes relevant, the question of jurisdiction is clearly bound up with the merits of the case.² If, on the other hand, the aim is simply to discourage the framing of declarations limited to specific disputes, such declarations are probably already insufficient to qualify as acceptances under Article 36 (2).³

(b) *Arbitration proceedings*

The United Kingdom declaration of 31 October 1955 featured a new reservation *ratione personae* covering 'any dispute which the United Kingdom . . . has already submitted to arbitration by agreement with any State which had not at the time of submission accepted the compulsory jurisdiction of the International Court of Justice'. As already mentioned, the formulation of this reservation followed the breakdown of the *Buraimi* arbitration with Saudi Arabia and was evidently intended to prevent the submission of that dispute to the Court.⁴

¹ Malta, Mauritius, New Zealand, the Philippines and Somalia; there are minor differences of wording.

² See Rosenne, *Time Factor*, pp. 22, 23, also pointing out that the material aspect of the French formula raises the same problem.

³ The apparent acceptance of the Egyptian declaration of 1957, despite its limited scope, perhaps indicates that this matter is not entirely free from doubt.

⁴ Waldock, p. 268. For discussion of the *Buraimi* dispute see Simpson and Fox, *International*

The deposit of a new declaration with this objective only five months after the deposit of the previous declaration is a clear example of the tactical use of the power to terminate a declaration, and the incorporation of the reservation in subsequent British declarations and in the declarations of two other Commonwealth States¹ suggests that its usefulness is not yet thought to be exhausted.

Professor Briggs² has expressed the view that this reservation is an unnecessary and unfortunate limitation on the Court's appellate jurisdiction, but this may be too harsh a judgment. Whilst the framing of a reservation to deprive the Court of jurisdiction in respect of a particular dispute can always be criticized, it cannot be said that this reservation evinces opposition to judicial settlement in principle. After all, before the reservation can apply a dispute must first have been submitted to arbitration. If, when this has occurred, the reservation takes effect, it will be because the Applicant has been converted to the cause of compulsory jurisdiction by the desire to reopen the case. The element of opportunism in such a use of the Court raises issues which have already been discussed, with the difference that the *Buraimi* reservation does not depend on the reserving State's terminating or amending its declaration, but is entirely automatic in its operation.

(c) *Commonwealth disputes*

The reservation of disputes with any other member of the British Commonwealth originated in the declarations ratified by the United Kingdom and the Commonwealth States in 1930. In 1955 the declarations of the seven Commonwealth parties to the Optional Clause³ all included such a reservation. In recent years, however, as the justification for this reservation has been questioned, a significant change in practice has occurred.

Commonwealth declarations now total fourteen, or almost one-third of the total. However, of the nine new Commonwealth States to deposit declarations since 1955 only four⁴ have incorporated the Commonwealth reservation, which has also been omitted from the latest declarations of Australia and New Zealand. Thus only seven States⁵ retain the reservation and this includes the United Kingdom, in whose latest declaration the Commonwealth reservation is limited to disputes 'with regard to situations or facts existing before 1 January, 1969'. Those States which retain the reservation do so with a number of other differences of wording, the main significance of which appears to be that some would cover disputes with Pakistan and South Africa⁶, whilst others would not.⁷

Arbitration (1959), *passim*, and Luard (ed.), *The International Regulation of Frontier Disputes* (1970), pp. 144-50.

¹ Malta and Mauritius.

² Briggs, p. 301.

³ Australia, Canada, India, New Zealand, Pakistan, South Africa and the United Kingdom.

⁴ Gambia, Kenya, Malta and Mauritius.

⁵ South Africa, it will be recalled, is no longer a party to the Optional Clause, and Pakistan is no longer a member of the Commonwealth.

⁶ For example the declaration of India which reserves 'disputes with the government of any State which is or has been a Member of the Commonwealth of Nations'. The adoption of this formulation followed Pakistan's leaving the Commonwealth. In the previous declaration of

[See p. 104 for n. 6 cont. and n. 7

It seems clear that the decline of the Commonwealth reservation can be explained by a growing sense that it has outlived its usefulness. As Professor Macdonald has pointed out,¹ the suggestion that Commonwealth disputes might be referred to an indigenous judicial tribunal has no prospect of realization and the diversity of the contemporary Commonwealth strains the characterization of its members' disputes as fraternal squabbles. The reciprocity principle ensures that the retention of the Commonwealth reservation by a significant number of States will keep many disputes from the Court. However, it seems reasonable to suggest that with its *raison d'être* so much in doubt, a further erosion of this limitation on the Court's jurisdiction can be anticipated.

(d) *Non-recognition*

In declarations accepting the jurisdiction of the Permanent Court several examples can be found of reservations *ratione personae*, designed to cover disputes in which special political factors pertaining to the State concerned rendered judicial settlement unpalatable.² Such reservations related to non-recognition or cognate issues and have continued to be employed, albeit infrequently, in acceptances of the jurisdiction of the present Court.

Israel is, of course, the prime example of a State for which the issue of recognition has been of critical significance and the declaration deposited in 1950 incorporated a reservation designed to cover the institution of proceedings by an unfriendly State. The reservation covered 'any dispute between the State of Israel and another State which refuses to establish or maintain normal relations with it', and was open to criticism in two respects. The use of the phrase 'normal relations' rather than 'normal diplomatic relations' made the reservation undesirably broad, because it could be argued that it covered failure to establish or maintain trade and communications, as well as diplomatic relations. Moreover, according to Meron,³ it was pointed out in diplomatic correspondence with Israel that the reservation could be construed as an exclusion of the Court's jurisdiction in any case that might be referred to it. Since the reservation was not intended to have this effect and would almost certainly have contravened Article 36 (6) if it had, the point was clarified, first in further diplomatic correspondence, then in the instrument of ratification of the declaration in 1951.

This clarification was, however, itself open to criticism and so to meet this and the earlier point Israel's current declaration, which was deposited in 1956, incorporates a revised reservation *ratione personae*. This now covers:

Any dispute between the State of Israel and any other State whether or not a member of the United Nations which does not recognise Israel or which refuses to establish 14 September 1959, the reservation covered 'disputes with the Government of any State which, on the date of this Declaration, is a member of the Commonwealth of Nations'.

⁷ For example the declaration of the United Kingdom which, subject to the condition *ratione temporis* already mentioned, reserves 'disputes with the government of any other country which is a Member of the Commonwealth . . . '.

¹ Macdonald, pp. 31-2.

² See the declaration of Yugoslavia and the unratified declaration of Poland, discussed by Meron, pp. 320, 321.

³ Meron, pp. 319-24, discussing also the origin and subsequent modification of this reservation.

or maintain normal *diplomatic* relations with Israel *and the absence or breach of normal relations precedes the dispute and exists independently of that dispute*.¹

India is the only other State which currently employs a comparable reservation. Her latest declaration, deposited in 1974, incorporates two reservations *ratione personae*. One, which is entirely new, covers 'disputes with non-sovereign States or territories'. The other, which is an elaboration of a reservation introduced in 1959, covers 'disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognised by the Government of India'.

This reservation is confined to non-recognition and the absence of diplomatic relations and thus cannot be said to be inconsistent with Article 36 (6). It contains no other qualification, however, and thus, unlike the revised Israeli reservation, makes the diplomatic consequences of the immediate dispute a possible barrier to the Court's jurisdiction.² This may have been an oversight. If it was not, it must be regarded as a thoroughly retrograde step. Whilst it is entirely legitimate for a State to decline to litigate at the suit of those who deny its very existence, to remove from the Court a dispute for no better reason than that the issue has become politically serious is to deny that adjudication can contribute to the settlement of contentious issues and thus to undermine the authority, as well as the jurisdiction of the Court.

OBLIGATIONS *RATIONE MATERIAE*

(a) *Other means of peaceful settlement*

As already noted, the Netherlands declaration of 1921 was the first to include a reservation excluding from the Court's jurisdiction disputes for which some other means of peaceful settlement has been agreed. The use of this reservation soon became quite common.³ In 1955 more than one-third of the parties to the Optional Clause included it in some form and it is now to be found in no less than twenty-five of the declarations currently in force.

These reservations exhibit a number of variations of detail. The United Kingdom reservation which covers 'any dispute which the United Kingdom . . . has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement' is typical. But three declarations⁴ cover only disputes submitted to 'other tribunals', a formula which, it has been suggested,⁵ would not exclude disputes submitted to the United Nations Security Council. Two declarations deposited in the period under review are even narrower, being confined to cases of resort 'for final and binding decision to arbitration or judicial

¹ Emphasis added.

² See *I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, p. 142 (1973).

³ See Schücking, *Recueil des cours*, 20 (1927-V), p. 386.

⁴ Those of Liberia, Panama and the United States.

⁵ Briggs, pp. 297, 298, where it is pointed out that the reference to 'tribunals' may have been inspired by Article 95 of the Charter.

settlement' and 'to other means of peaceful settlement for its [*sic*] final and binding decision'.¹

Under Article 88 of the Rules of the Court the parties to a case are free to discontinue proceedings at any time. It may therefore be asked whether, despite its increasing popularity, a reservation covering alternative means of settlement is really necessary. In the absence of any case in which the scope of the reservation has been considered, the answer is not entirely clear. It would appear, however, that the aim of the reservation is to cover a situation in which proceedings are instituted in the Court in violation of an agreement to use some other means of settlement.² If this is so, then the reservation may indeed be unnecessary, since the Court might well decline to adjudicate in such a situation on grounds of judicial propriety.³

However, the Court's handling of the recent request for interim measures of protection in the *Aegean Sea Continental Shelf* case⁴ has drawn attention to the problems that may be encountered when a dispute is referred to several institutions simultaneously. It can therefore be argued that there may be considerable advantages in a reservation that 'facilitates adjustments between systems of dispute settlement and allows States maximum flexibility in their choice of procedures . . .'.⁵

Declarations accepting the jurisdiction of the Permanent Court commonly included another type of reservation designed to harmonize arrangements for peaceful settlement. This reserved 'the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of 12 months or such longer period as may be agreed by the Parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute'.

This reservation originated in the declarations made by the United Kingdom and the Commonwealth States in 1930, but by 1955 was found only in the declarations of Canada, India and New Zealand. Australia, however, included a revised version, which substituted the Security Council for the Council of the League.⁶ All four reservations have now been abandoned.

¹ The declarations are those of Japan and Austria. On the former see Taoka, *Japanese Annual of International Law*, 1959, p. 1 at p. 10.

² For India's use of this argument see *I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, p. 142 (1973).

³ Briggs, p. 298.

⁴ *Aegean Sea Continental Shelf, Interim Protection*, Order of 11 September 1976, *I.C.J. Reports*, 1976, p. 3. For comment on the Court's handling of the request see Gross, *American Journal of International Law*, 71 (1977), p. 31, and Merrills, *Law Quarterly Review*, 93 (1977), p. 29.

⁵ Macdonald, p. 28; see also Rosenne, pp. 83-7, and Ciobanu, 'Litispence between the International Court of Justice and the Political Organs of the United Nations', in Gross (ed.), *The Future of the International Court of Justice* (1976), p. 209.

⁶ For comment on these reservations see Macdonald, pp. 28-30, and Briggs, pp. 298-300.

(b) *Multilateral treaties*

The United States' declaration of 1946 was the first to include a reservation covering

disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court or (2) the United States of America specially agrees to jurisdiction.

The atmosphere of intellectual confusion in which this unfortunate reservation was adopted by the United States Senate is well documented.¹ The aim, it appears, was to ensure that where a dispute over a multilateral treaty involved the United States and more than one other State, the Court would lack jurisdiction unless all were parties to the case, or the United States consented to the proceedings. Why this should have been thought desirable is unclear, since Article 59 of the Statute lays down that only the parties to a case are bound by the Court's decision and Article 63 creates a right of intervention by third States where the construction of a multilateral treaty is in issue. It must also be noted that the phrase 'all parties to the treaty affected by the decision' appears broad enough to include every party to the treaty, so the reservation could be argued to impose the quite impractical requirement that all such States be parties to the case.²

In 1955 Pakistan was the only other State to incorporate this questionable reservation. Today, however, it is also to be found in the declarations of four other States³ and must now be regarded as a conspicuous limitation on the Court's jurisdiction.

(c) *Belligerency*

In September 1939, as already mentioned, France, the United Kingdom and five Commonwealth States sought to amend their acceptances of the jurisdiction of the Permanent Court to exclude disputes arising out of the current war.⁴ In due course these and similar reservations were incorporated in new declarations and today eight States include reservations which relate in some way to belligerency.

In the period under review some interesting changes in practice have occurred. Of the six States which had such a reservation in 1955 only India is among the present number. The latest declarations of Canada and the United Kingdom contain a reservation *ratione temporis* which makes a reservation to cover the Second World War unnecessary; Australia and New Zealand have simply abandoned the reservation and South Africa is no longer a party to the system.

The States which currently employ the reservation do so in terms which vary a good deal. One reservation⁵ covers disputes arising out of events during a

¹ See Briggs, pp. 306-8, and Wright, *American Journal of International Law*, 41 (1947), p. 445.

² Preuss, *American Bar Association Journal*, 32 (1946), p. 660, and Hudson, *ibid.*, p. 832, and *American Journal of International Law*, 41 (1947), p. 12, argue that the reservation must be interpreted broadly. However, Wilcox, *American Journal of International Law*, 40 (1946), p. 714, and Wright (previous note) suggest that a narrower interpretation is to be preferred.

³ El Salvador, India, Malta, the Philippines. In 1973 Pakistan's reservation was invoked by India: see *I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, pp. 142, 143.

⁴ On practice after the First World War see Rosenne, *Time Factor*, pp. 64-7.

⁵ Sudan.

period of belligerency. As might be expected, Israel's declaration goes a good deal further and, in addition to the special reservation *ratione temporis* already discussed, now includes a broad reservation designed to cover both hostilities involving Israel and the aftermath of belligerency. The declaration of Malawi, on the other hand, is limited to 'disputes concerning any question relating to or arising out of belligerent or military occupation'. Three other declarations¹ are similar with the important addition of the words 'or the discharge of any functions pursuant to any recommendation or decision of any organ of the United Nations in accordance with which the Government . . . have accepted obligations'. The scope of this reservation is not entirely clear. It certainly seems broad enough to cover disputes over peacekeeping activities. Since under Article 96 of the Charter the Court is designated 'the principal judicial organ of the United Nations' this is a depressing development, for no comparable reservation is to be found in any of the 1955 declarations.

The references to hostilities, belligerent occupation and actions authorized by the United Nations are combined in two recent and particularly comprehensive reservations.² The Indian reservation, which may well have been devised in the light of the claim brought by Pakistan in the *Prisoners of War* case,³ covers:

disputes related to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved.⁴

The development of reservations relating to belligerency thus discloses a disquieting trend away from the exclusion of disputes arising out of a particular war, towards the exclusion of disputes arising out of belligerent occupation, the use of force for United Nations purposes and in the latest declarations almost any use of force by the reserving State. This can perhaps be seen as a reflection of the changing role of force in contemporary international affairs.⁵ Such reservations are still exceptional, particularly in their broadest and most objectionable form. They deal, however, with an area of international law of fundamental importance and must consequently be regarded as a pernicious erosion of the Court's jurisdiction.

(d) *Miscellaneous reservations*

The current Israeli declaration includes a reservation which covers disputes involving 'a legal title created or conferred by a government or authority other than the Government of Israel or an authority under the jurisdiction of that

¹ Kenya, Malta and Mauritius.

² El Salvador and India.

³ See Nawaz, *Indian Journal of International Law*, 13 (1973), p. 251. Proceedings in the case were ultimately discontinued: see *Trial of Pakistani Prisoners of War*, Order of 15 December 1973, *I.C.J. Reports*, 1973, p. 347.

⁴ The declaration of El Salvador substitutes the words 'or may at some time be involved' (translation) for the last phrase.

⁵ The increasing importance of means of coercion short of all-out war is reflected in current concern with defining aggression: see Ferencz, *Defining Aggression* (1975); with the concept of reprisals: see Onuf, *Reprisals, Rituals, Rules, Rationales* (1974); and with the status of guerrilla warfare: see Kossoy, *Living with Guerrilla* (1976).

Government'. The purpose of this reservation, which may not at first be apparent, is to exclude from the Court's jurisdiction disputes arising out of the activities of the government of Mandatory Palestine, the Jewish Agency or any similar bodies before the creation of the State of Israel.¹ For obvious reasons this reservation, which was incorporated in a substantially similar form in Israel's 1951 declaration, has not been imitated and thus requires no further discussion here.

The United Kingdom declaration of 2 June 1955 was the first to include a reservation covering 'disputes relating to any matter excluded from compulsory adjudication or arbitration under any treaty, convention or other international agreement or instrument'. The need for this reservation is unclear.² If limited to agreements with the applicant State the reservation is probably unnecessary. If, on the other hand, the reservation is to be interpreted more broadly, it appears to create the possibility of excluding new issues from the Court's jurisdiction by concluding agreements with third States. The reservation is omitted from the latest United Kingdom declaration, but has already been incorporated in the declarations of three other States.³

The Canadian Declaration of 1970 contains a reservation covering:

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coasts of Canada.

As already mentioned, the main object of this reservation is to cover disputes over the controversial Canadian Arctic Waters Pollution Prevention Act of 1970. The justification for this reservation and the merits of the Act have already been the subject of much discussion.⁴ All that need be added here is that if reservations addressed to particular disputes are to be employed at all, it is clearly desirable that they should be couched in restricted terms. Such reservations constitute a minimal derogation from the Court's compulsory jurisdiction and, more importantly, do not invite imitation. Although the extent of the Canadian reservation can certainly be criticized, if, as seems probable, the special problems of environmental protection in the Arctic are recognized in a future treaty on the law of the sea,⁵ Canada may eventually be able to follow the example of Australia and deposit an unqualified acceptance of the Court's jurisdiction.⁶

¹ Meron, pp. 328-30.

² The suggestion has been made that it may have been a response to the Court's assumption of jurisdiction in the *Ambatielos* case, *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports*, 1952, p. 93; see Briggs, pp. 300-1.

³ Democratic Kampuchea, Malta and Mauritius.

⁴ An excellent discussion of Canadian policy is to be found in the essay by M'Gonigle and Zacher which forms the third chapter of Johnson and Zacher (eds.), *Canadian Foreign Policy and the Law of the Sea* (1977). See also Green, *Canadian Bar Review*, 48 (1970), p. 740; Bilder, *Michigan Law Review*, 69 (1970-1), p. 1; Pharand, *Texas International Law Journal*, 7 (1971), p. 45; Gotlieb and Dalfen, *American Journal of International Law*, 67 (1973), p. 229, and McConnell, *University of Florida Law Review*, 25 (1973), p. 465.

⁵ See the discussion of this issue by M'Gonigle and Zacher (previous note).

⁶ As already noted, the Australian declaration of 1954 was the first to include a reservation designed to cover the dispute over pearl fisheries with Japan. This reservation is omitted from the latest Australian declaration which was deposited in 1975.

A concern with the law of the sea is also apparent in the recent declaration of New Zealand. The reservation of the right to amend the declaration in the light of the results of the Third United Nations Conference on the Law of the Sea in respect of the settlement of disputes has already been mentioned. In addition, the latest declaration, which was deposited in 1977, includes a new reservation *ratione materiae* covering:

Disputes arising out of, or concerning, the jurisdiction or rights claimed or exercised by New Zealand in respect of the exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

More serious than the Canadian and New Zealand reservations are three reservations dealing with much broader issues of territorial sovereignty. A two-part Philippine reservation contains a specific provision relating to the resources of the continental shelf and a very broad exclusion of issues of territorial sovereignty. A reservation in the current Indian declaration goes even further and, though clearly inspired by the 1973 declaration of El Salvador, goes beyond it in covering:

Disputes with India concerning or relating to:

- (a) the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries;
- (b) the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels;
- (c) the conditions and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it;
- (d) the airspace superjacent to its land and maritime territory; and
- (e) the determination and delimitation of its maritime boundaries.

Although the reservation of questions of territorial sovereignty is not unprecedented,¹ this is almost certainly the broadest reservation *ratione materiae* yet devised. It is part of a declaration which contains ten other reservations, several of which are couched in the broadest terms. Such reservations go far beyond the exclusion of particular disputes. If they were to be widely imitated—and fortunately this has not yet occurred—the unavoidable effect would be to shrink jurisdiction under Article 36 (2) to the point of insignificance.

DOMESTIC JURISDICTION

The plea that a case before the International Court should be dismissed on the ground that it concerns a matter of domestic jurisdiction has a dual character.

¹ For example, Iran's declaration of 1932 reserved 'disputes relating to the territorial status of Persia, including those concerning the rights of sovereignty of Persia over its islands and ports' (translation) and the 1928 declaration of Greece contained a substantially similar reservation. For the Court's interpretation of the corresponding reservation to the 1928 General Act see *Aegean Sea Continental Shelf*, Judgment, *I.C.J. Reports*, 1978, p. 3.

Under Article 36 (2) of the Statute the jurisdiction of the Court is limited to the four classes of legal disputes there enumerated. Since all four are disputes concerning questions of international law, the plea of domestic jurisdiction can always be raised as an objection to the Court's jurisdiction. To succeed on the merits, however, a State must show that its opponent is in breach of an obligation imposed by international law. As a result, the plea of domestic jurisdiction may also be used as a substantive defence.¹

It follows that it is unnecessary for States in their declarations under Article 36 (2) to reserve matters of domestic jurisdiction specifically. Perhaps for this reason the earliest acceptances of the jurisdiction of the Permanent Court made no mention of domestic jurisdiction, and it was only in 1930 that such a reservation was introduced by the United Kingdom and the Commonwealth States. Though described by one commentator as '... a prudent precaution not alien to the genius of a country where the conveyancer has his home',² the domestic jurisdiction reservation lacked any really convincing justification and came in for a good deal of subsequent criticism. Such reservations were, however, soon included in a number of other declarations and as popular and distinctive limitations *ratione materiae* call for special attention.

The scope and significance of such reservations have been discussed by both the present Court and its predecessor on a number of occasions and no useful purpose would be served by repetition of previous accounts of this aspect of their work.³ The Permanent Court's advisory opinion in the *Tunis and Morocco Nationality Decrees* case⁴ is still the leading authority on the question and the Court's celebrated statement that 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations'⁵ has been consistently employed to frustrate attempts to use the concept of domestic jurisdiction to resist claims of an international character.

A somewhat unusual point arose in the recent *Aegean Sea Continental Shelf* case⁶ where the Court was required to consider the scope of a Greek reservation to the General Act of 1928, excluding from the Court's jurisdiction:

Disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular (*notamment*) disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication.

Deciding that 'disputes relating to the territorial status of Greece' must be regarded as a separate and independent category of reserved disputes, not restricted by the preceding reference to domestic jurisdiction, the Court went on to hold that the dispute before it, which concerned Greek and Turkish rights to the continental shelf in the Aegean, was covered by the reservation.

¹ See Waldock, this *Year Book*, 31 (1954), p. 96.

² Fischer Williams, this *Year Book*, 11 (1930), p. 76.

³ See Waldock, loc. cit. (above, n. 1); Briggs, pp. 309-63.

⁴ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, *P.C.I.J.*, Series B, No. 4 (1923).

⁵ *Ibid.*, p. 108.

⁶ *Aegean Sea Continental Shelf*, Judgment, *I.C.J. Reports*, 1978, p. 3.

More significant in the present context is the Court's earlier decision in the *Right of Passage* case in which its discussion of the plea of domestic jurisdiction under the Optional Clause is typical of its treatment of the concept. India argued in her Fifth Preliminary Objection that the dispute over Portugal's alleged right of passage fell exclusively within her domestic jurisdiction. The Court's first step was to join this objection to the merits on the ground that here, as in previous cases of domestic jurisdiction, the issues raised were too closely bound up with the substance of the dispute to be evaluated independently.¹ After hearing argument on the merits and noting that the parties had relied upon or contested treaties, international custom and principles of international law, the Court dismissed the objection, holding that as the parties had put themselves on the plane of international law, the dispute could not be said to fall exclusively within India's domestic jurisdiction.²

In the *Right of Passage* case the unsuccessful Indian argument was based on both the language of the Statute and her reservation of domestic jurisdiction. As already indicated, the same argument could have been based on the Statute alone. Current practice indicates, however, that a significant number of States have yet to be persuaded on the point. Over one-third of the parties to the Optional Clause still reserve the question of domestic jurisdiction, a proportion which has scarcely changed since 1955. Twelve of the current reservations are in the 'objective' form, so that the effect of the reservation is decided by the Court, in accordance with Article 36 (6). The remaining six are in the subjective form and purport to refer the question to the reserving State.

Exactly half the eighteen States which have become parties to the Optional Clause since 1955 have deposited declarations containing a reservation of domestic jurisdiction. Of the original parties the United Kingdom, Australia and New Zealand have omitted the reservation from their latest declarations; on the other hand El Salvador and the Philippines have recently adopted the reservation for the first time, the latter in its unwholesome subjective form.

Reservations in the objective form are found in two versions. Eight States reserve matters 'exclusively' and four matters 'essentially' within the domestic jurisdiction. The majority version derives from the language of Article 15 (8) of the League Covenant and was first used in the British declaration of 1930. The minority version is modelled on Article 2 (7) of the United Nations Charter and originated in the United States' declaration of 1946.

Whether anything turns on this difference of wording was argued at some length in the *Anglo-Iranian Oil Co.* case,³ but neglected in the Court's judgment. The question had already been raised a little earlier in the *Peace Treaties* case,⁴ where the Court's advisory opinion indicated that so far at least as treaty interpretation is concerned, the effects of the two formulations are identical. This conclusion has been widely supported⁵ and the fact that the more recent

¹ *I.C.J. Reports*, 1957, p. 125.

² *Right of Passage over Indian Territory, Merits*, *I.C.J. Reports*, 1960, p. 6 at pp. 32, 33.

³ See Briggs, pp. 318-21.

⁴ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, *I.C.J. Reports*, 1950, p. 65.

⁵ See Briggs, pp. 318-28.

version has not been widely adopted perhaps indicates that it is now the accepted view.

So reservations of the objective type are superfluous and, however worded, add nothing to the Statute. Very different, however, is the case of reservations couched in the subjective form inspired by the American declaration of 1946. That reservation, sometimes known as the Connally Amendment, or the 'automatic' reservation, excludes from the Court's jurisdiction 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'.

The circumstances in which this unhappy form of words was devised have often been described.¹ The legal effects of the reservation have also been the subject of extensive discussion. In his excellent study of the plea of domestic jurisdiction Professor Waldock has argued that this attempt to deprive the Court of the power to determine the scope of its jurisdiction is incompatible with Article 36 (6) of the Statute and has suggested that it is even doubtful whether a declaration incorporating such a reservation can be regarded as an acceptance of the Court's jurisdiction under Article 36 (2).² Though not all commentators have been willing to go so far,³ considerable support has been expressed for this view.

In the *Case Concerning Rights of United States Nationals in Morocco*⁴ in 1952 the Court took jurisdiction on the basis of *forum prorogatum* and so, although the United States was a party to the case, the effect of the automatic reservation was not in issue. Similarly when in the 1955 *Aerial Incident* case⁵ it became clear that Bulgaria proposed to exercise her right to invoke the reservation on a reciprocal basis, the United States discontinued proceedings. On two occasions, however, the effect of the reservation has been considered.

In the *Norwegian Loans* case⁶ France instituted proceedings against Norway over the question of loans which the latter had floated abroad and which were alleged to be repayable in gold. Norway raised a number of preliminary objections, including the question of domestic jurisdiction. The Norwegian argument on this point was in two parts. First, it was argued that Article 36 (2) limited the Court's jurisdiction to questions of international law, but that the loan contracts were governed by municipal law. As we have seen, in this form the domestic jurisdiction argument is based on the Statute and does not depend on the terms of the parties' declarations. Secondly, however, Norway argued that if there were any doubts on the first point, she was entitled to invoke the subjective domestic jurisdiction reservation in the French declaration and decide unilaterally that the matter was one of domestic jurisdiction.

After joining this and the other preliminary objections to the merits, the Court

¹ See, for example, Wilcox, *American Journal of International Law*, 40 (1946), p. 699; Preuss, *ibid.*, p. 720, and Briggs, pp. 328-35. ² Waldock, *this Year Book*, 31 (1954), pp. 131-7.

³ Compare, for example, the contrasting views expressed by Preuss and Wilcox, *loc. cit.* (above, n. 1). For an intermediate view see Rosenne, pp. 395-9.

⁴ *Rights of Nationals of the United States of America in Morocco*, Judgment, *I.C.J. Reports*, 1952, p. 176.

⁵ See *Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)*, Order of 30 May 1960, *I.C.J. Reports*, 1960, p. 146, and Gross, *American Journal of International Law*, 56 (1962), p. 357. ⁶ *Certain Norwegian Loans*, Judgment, *I.C.J. Reports*, 1957, p. 9.

upheld the second branch of the Norwegian argument and dismissed the case. The Court declined to examine the first part of the Norwegian argument and held that it was also unnecessary to consider the validity of the reservation on which Norway had successfully relied.

In his outstanding separate opinion¹ Sir Hersch Lauterpacht indicated his fundamental disagreement with the Court's approach. In his view the automatic reservation was invalid and vitiated the French declaration. Therefore instead of purporting to apply a reservation of undetermined validity, the Court should have dismissed the case on the ground that France had not accepted its jurisdiction.

In the *Interhandel* case² in the same year the domestic jurisdiction reservation was invoked in rather different circumstances. Switzerland instituted proceedings against the United States on the basis of their respective declarations under Article 36 (2) and, pending the hearing of the case, sought interim measures of protection. The United States challenged this request on the merits, but also invoked the Connally Amendment. The Court held that though the validity of the reservation of domestic jurisdiction was not relevant to the instant proceedings, Switzerland had failed to show that interim measures of protection were required by the circumstances of the case.

Lauterpacht again registered his disagreement.³ Whilst he supported the Court's conclusion that it would be inappropriate to examine the validity of the United States' declaration in preliminary proceedings, he held that the American reliance on her reservation of domestic jurisdiction, which for the moment must be assumed to be valid, precluded any consideration of interim measures of protection, regardless of the merits of the request. The power to indicate interim measures is part of the Court's incidental jurisdiction and as such is derived from Article 41 of the Statute. It is thus independent of the jurisdictional basis of the particular proceedings. But Lauterpacht held that where, as here, the Court manifestly lacked substantive jurisdiction, a State was entitled to expect that as a matter of judicial propriety, the Court would dismiss a request for interim measures, without reference to its merits.

At the next stage of the case the United States again invoked the automatic reservation and made a number of other preliminary objections. After considering and rejecting the objections *ratione temporis* already considered, the Court ruled the Swiss application inadmissible on the ground that local remedies had not been exhausted, and again declined to discuss the automatic reservation.⁴ In a dissenting opinion, traversing what was by now familiar ground, Lauterpacht repeated his view that the effect of the reservation was to invalidate the whole United States' declaration, and concluded that the decision to dismiss the case should have been based on this ground.

Whether the automatic reservation is invalid or merely a devastating deficiency in the system of compulsory jurisdiction—and the Waldock/Lauterpacht view has much to commend it—such reservations continue to play a significant part in

¹ *Certain Norwegian Loans*, Judgment, *I.C.J. Reports*, 1957, pp. 34-66.

² *Interhandel, Interim Protection*, Order of 24 October 1957, *I.C.J. Reports*, 1957, p. 105.

³ *Ibid.*, pp. 117-20.

⁴ *Interhandel*, Judgment, *I.C.J. Reports*, 1959, p. 6.

State practice. In 1955 six States included a reservation in this form. Today three of those States, the United States, Mexico and Liberia, retain the same declaration. France and South Africa have left the Optional Clause system and Pakistan has substituted a reservation in the objective form. Unfortunately, two first declarations have been deposited incorporating the subjective formula¹ and, as already mentioned, in 1972 the Philippines deposited a fresh declaration in this form.

CONCLUSIONS

Having examined recent developments concerning the various limitations on the Court's jurisdiction individually, it is now possible to assess the present state of the Court's compulsory jurisdiction and to compare it with the situation in 1955.

At the time of Professor Waldock's study over three-fifths of the thirty-three declarations then in force contained no major reservations *ratione materiae* and either included no provision for termination or provided for termination only after a fixed date or a period of notice. The nineteen declarations which comprise this group today are just over two-fifths of the current total. Conversely, there are now fifteen declarations which in substance resemble the first group, but which are effectively terminable on notice or reserve the right to terminate or vary with immediate effect. In 1955 there were just six declarations in this group. These figures can lead to only one conclusion, that Professor Waldock was right to identify the issue of termination as a major threat to the ideal of compulsory jurisdiction.

Declarations which incorporate major reservations *ratione materiae* have developed rather differently. As has been seen, the number of declarations which incorporate the domestic jurisdiction reservation in its subjective or 'automatic' form has remained steady at six. Proportionally, therefore, the declarations in this category have fallen significantly. Clearly, then, the automatic reservation appears to be losing ground and the major threat which it once appeared to pose has not yet materialized.

This encouraging evidence is, however, offset by the number of declarations which now incorporate some other major limitation on the Court's jurisdiction, such as the multilateral treaties reservation or the comprehensive reservation of issues of territorial sovereignty. In 1955 there were no declarations in this group which did not also incorporate the automatic reservation. Today there are five.² Such reservations are of course in every way to be preferred to the automatic reservation, but as the latest expedient for enfeebling the Court provide ample cause for concern.

Thus analysis of the declarations currently in force according to their degree of commitment to the Court's compulsory jurisdiction indicates that in the

¹ Sudan and Malawi.

² The declarations of El Salvador, India, Malta and Pakistan incorporate the multilateral treaties reservation. The declarations of El Salvador and India also incorporate very broad reservations relating to territorial sovereignty and cognate issues. The declaration of Egypt, as already noted, is confined to legal disputes arising under Egypt's Declaration on the Suez Canal.

period under review the decline of the Optional Clause has continued. Unqualified acceptances of the Court's jurisdiction have declined both proportionately and absolutely. Commitments of uncertain duration have increased and new and crippling reservations have done much to offset the declining popularity of the automatic reservation.

This conclusion is reinforced if the effect of other reservations is borne in mind. The use of increasingly stringent reservations *ratione temporis* may be a less-dramatic development than some, but is no less effective in reducing the scope of the Court's jurisdiction. Similarly, though use of some of the new reservations *ratione personae* can be defended as a means of preventing the unscrupulous use of the Court, their undeniable effect is to circumscribe its jurisdiction still further.

Further evidence of this decline is provided by the striking change in the character of individual declarations. All the acceptances of the jurisdiction of the Permanent Court, maintained in force by Article 36 (5), are very short. The declarations of the early post-war period tend to be somewhat longer and some recent declarations, as we have seen, are longer still and contain an unprecedented number and variety of reservations and conditions.

Fortunately such emasculated declarations are still exceptional. They are nonetheless significant because in common with all qualified acceptances of the Court's jurisdiction they must be read as a clear indication of a lack of confidence in the Court. When opinions are deeply divided on fundamental issues of international law, it is only to be expected that States which do not reject judicial settlement in principle nevertheless seek to limit its significance in practice. A convenient way of achieving this is to deposit declarations under Article 36 (2) incorporating provisions to be found in the declarations of other parties. As we have seen, the introduction of a new condition or reservation by one State is almost always followed by its adoption by others and the history of the Optional Clause could be regarded as an object lesson in the force of example.

There is a mitigating factor here of some importance. The trend we have identified is by no means uniform and some countervailing evidence can be found. Over a third of the current declarations are positive and unequivocal acceptances of compulsory jurisdiction and constitute an unambiguous commitment to the Court. Half of these have been deposited since 1945 and some, like the New Zealand declaration of 1977, are quite recent. These too are an example and indicate that compulsory jurisdiction, as an ideal, is far from dead.

More significant may be the fact that the latest declarations of two States not in this group disclose a greater commitment than the declarations they replace. One of these is the United Kingdom¹ whose treatment of conditions and reservations has, as we have seen, been infectious in the past. If a revival of confidence in the Court were to lead to a revision of the United States' declaration, and attention could be focused on the best, rather than the worst, examples of practice elsewhere, declarations under Article 36 (2) might one day resume their place as an important source of international jurisdiction.

¹ The other is Australia.

WHAT IS AN AGREEMENT IN INTERNATIONAL LAW?*

By KELVIN WIDDOWS†

THE quest for a precise definition or description of the terms 'treaty' and 'international agreement' has drawn scholars over the years into a labyrinth of tautology.

The terms, to begin with, have many senses of meaning. A 'treaty' in its narrowest sense is often thought of as a particularly formal instrument recording and constituting an international agreement. But the term is elastic and employed just as often to describe any binding international agreement. Hence the name 'Treaty Department' in most Foreign Offices today.¹ Indeed, much of the doctrinal argument in the International Law Commission, when it began to deal with the law of treaties, arose out of misunderstandings and confusion over the scope of the Commission's mandate: if it were to deal with 'treaties', argued some, should it not confine itself to those more formal instruments of agreement requiring ratification? Later in the Commission's dealings, the Special Rapporteurs made it clear that the draft articles were intended to cover all forms of binding international agreement excepting those not recorded in writing.²

Accordingly, there are dangers in reading the 'definition' section of the codes on treaty law as anything more than self-limiting provisions concerning the scope of the rules that follow.³ The present Article, however, is concerned with the term

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¹ Judge Jessup in his separate opinion in the *South West Africa case (First Phase)*, *I.C.J. Reports*, 1962, p. 402, went as far as to claim: 'The notion that there is a clear and ordinary meaning of the word "treaty" is a mirage.' For some indication of the problems involved, Myers in *American Journal of International Law*, 51 (1957), p. 574, provides a lucid account of what a treaty is not.

² It is arguable that the disputes in the early days of the Commission's consideration of the question were as much an expression of concern after the Second World War that the treaty-making procedure be subject to as much of the 'democratic process' as possible: hence the attempted link between treaty as a concept of obligation and the ratification process.

The Reports of the Special Rapporteurs of the International Law Commission will be referred to by name and a number indicating the particular report, e.g., Waldock III: Sir Humphrey Waldock's Third Report; Lauterpacht I: Sir Hersch Lauterpacht's First Report, and so on. For convenience the United Nations reference numbers for the relevant reports are given below:

Brierly I, A/CN. 4/24, *Yearbook of the International Law Commission*, 1950, vol. 2, p. 222; Brierly II, A/CN. 4/43, *ibid.*, 1951, vol. 2, p. 70; Lauterpacht I, A/CN. 4/63, *ibid.*, 1953, vol. 2, p. 90; Lauterpacht II, A/CN. 4/87, *ibid.*, 1954, vol. 2, p. 123; Fitzmaurice I, A/CN. 4/101, *ibid.*, 1956, vol. 2, p. 104; Fitzmaurice II, A/CN. 4/107, *ibid.*, 1957, vol. 2, p. 16; Fitzmaurice IV, A/CN. 4/120, *ibid.*, 1959, vol. 2, p. 37; Waldock I, A/CN. 4/144, *ibid.*, 1962, vol. 2, p. 27; Waldock II, A/CN. 4/156, *ibid.*, 1963, vol. 2, p. 36; Waldock IV, A/CN. 4/177, *ibid.*, 1965, vol. 2, p. 3; Waldock V, A/CN. 4/183, *ibid.*, 1966, vol. 2, p. 1; Waldock VI, A/CN. 4/186, *ibid.*, 1966, vol. 2, p. 51.

³ e.g. Field, 'Outline of an International Code', *American Journal of International Law*, 29 (1935), Supplement, p. 1207; Bluntschli, *Le Droit international codifié* (5th French edn., 1895);

'treaty' in its broadest sense. It is an enquiry into the elements comprising a binding international agreement.

The terminological problem, which is not critical for present purposes, is whether a treaty is the consensus ad idem itself or the instrument recording the terms of the agreement. Judge Basdevant,¹ for example, has, as is well-known, asserted that a 'treaty' is not an agreement but an instrument. If the term 'treaty' is used in its narrow sense (as he uses it) this may indeed be correct; for, considering that most definitions of treaty, in the narrow sense, require a formal instrument as a constituent element, Basdevant is going no farther than stressing one element of his definition. And for the rest, it must surely depend on whether or not a written record is required for an agreement to be binding in international law.²

Either way,³ this Article is concerned with the creation of obligation; the question whether the obligation arises through consensus or through an instrument recording that consensus is not one that causes any debate in practice. There appears, for example, to be only one reported case, and that of minor character, of rectification of an international agreement.⁴

Is it necessary to define 'treaty' or 'international agreement'? Perhaps there is no need to attempt to define with the precision of a philologist, but it is necessary to ascertain the elements that lead to bindingness: the requirements giving rise to obligation in this form. It is no doubt true, as Professor Jennings has written,⁵ that definitions of a general character, and not related to a particular context, have not often been made in practice, because 'it is hardly possible to discover any discriminating characteristic of "treaty" which would command general assent'. But clearly, as Professor Jennings asserts, some sort of working hypothesis is necessary.

It should be stated at the outset that it is not the purpose of this Article to discuss the question of capacity to conclude international agreements or treaties.

Fiore, *International Law Codified* (Borchard trans., 1918); Liszt, *Le Droit international* (Gidel trans., 1913); Harvard Research Draft on the Law of Treaties, *American Journal of International Law*, 29 (1935), Supplement, p. 666; Havana Convention on the Law of Treaties adopted by the Sixth International Conference of American States (in force for seven States), *American Journal of International Law*, 29 (1935), Supplement, p. 1205; American Law Institute, *Restatement of Foreign Relations Law* (2nd edn., 1965); American Institute of International Law Draft on Treaties, *American Journal of International Law*, 20 (1926), Supplement, p. 348.

¹ *Recueil des cours*, 15 (1926-V), p. 539. See also Genet, *Traité de diplomatie et de droit diplomatique*, vol. 3 (1932), p. 377; and, for an account of the I.L.C.'s attitude, Rosenne, *Transnational Law in a Changing Society* (1972), p. 205. The Harvard Research Draft, loc. cit. (previous note), at p. 686, took the same approach but it was concerned only with 'formal' instruments. Fitzmaurice I (commentary to Article 14, p. 119) took the view that if the text was not itself the agreement it was nevertheless indispensable and usually the sole evidence of what the agreement was. Brierly I (p. 228) thought the real nature of a treaty to be a legal act or transaction rather than a document.

² The majority of commentators appear to claim that writing is not necessary though the instances of practice cited in the books are few and ancient. It is here assumed that writing is not necessary to constitute a binding agreement. It does not seem to be a problem for Foreign Offices.

³ Sir Gerald Fitzmaurice's sensible approach seems to treat it as an amalgam of consensus and instrument.

⁴ Below, pp. 148-9.

⁵ Jennings, *Recueil des cours*, 121 (1967-II), p. 529.

The term 'international entities' will be employed to cover parties to agreements, and is meant to comprehend entities having capacity under international law to conclude treaties.¹

What, then, is meant by 'international agreement' or 'treaty'? Clearly there is first the element of agreement: consensus ad idem.² Most bilateral agreements are drawn up during negotiations and reflect the joint wishes of the parties. In the case of an exchange of notes the proposition is put, or offer made, by one party and subscribed to or accepted by the other in reply. Most multilateral agreements are negotiated in long and usually technical sessions of conference, and the text finally arrived at is said to reflect the agreement of all the States parties. In one sense it might be illusory to speak of agreement in such cases, in so far as agreement might be no more than resigned acceptance of a compromise text. But the text is nonetheless accepted, agreed to and subscribed.

To agree can, however, be to disagree, to agree on broad guidelines, to agree 'in honour', to agree to consider, to agree to endeavour to do something, to agree to do one's best and so on.³ What sort of agreement is it that leads to binding obligation in international law?

The books take a number of different stands. Many of the older ones proclaimed that the agreement must be moral, that the obligations undertaken must be equal and just, for both parties, and so on.⁴ That these requirements were necessary appears never to have been accepted in practice, and so far as any of them may be considered potent these days, their force would lie in the realm of the *jus cogens* rule, a rule which renders an infringing treaty void. In such cases, it

¹ We shall not discuss agreements between States and non-international entities to which, for some reason, international law applies.

² In fact agreement free of defects such as error, coercion, etc.

³ Scelle, in his book *Théorie juridique de la révision des traités* (1936), makes the point that not all agreements are agreements in law. In a municipal system, for example, two judges might agree on a judgment they are delivering but the result is not an 'agreement' in law. Judges Spender and Fitzmaurice in their joint dissent in the *South West Africa* cases (*First Phase*), *I.C.J. Reports*, 1962, p. 464, make the same point, stressing characterization of the agreement: did the parties bind themselves through the agreement or in some other way? This is perhaps a little far-fetched. The examples of Scelle do not involve rights and duties between the parties, a notion inherent in the concept of contract or treaty even when not explicitly stated, as in the *American Restatement* (§ 115). What is important is that the agreement be settled and final and not simply one stage of protracted negotiations: see the remarks of Lord Sumner in *The Blonde*, [1922] 1 A.C. 313, 321.

⁴ Otelechano, *De la valeur obligatoire des traités internationaux* (1916), discusses this point in some detail, giving a multitude of references. The writer concludes that there was by 1916 no State practice in support of injecting adjectival requirements such as 'moral' or 'humane' into the concept of international agreement. The debates in the International Law Commission and at the Vienna Conference on the alleged necessity for treaties to be 'equal' (not adopted by the Conference except as a Declaration on the Prohibition of Military, Political or Economic Coercion, in the form of a solemn condemnation forming portion of the Final Act of the Convention) reflect a similar preoccupation, though based on political considerations. State practice gives little comfort to the proponents of such a doctrine. There are many examples of one-sided bargains, most of which could scarcely be labelled immoral: aid agreements alone need be mentioned. And it is worth recalling that when the classical writers treated of 'equality', they did so in the context of classification rather than validity (e.g. Vattel, book II, ch. 12). Hall (*International Law* (8th edn., 1924), p. 416) claimed that these alleged requirements were of such pernicious looseness that an unscrupulous State would never be in want for plausible excuses for repudiation.

may be argued, an agreement comes into existence under the rules here being considered but is instantaneously avoided by a rule of a different kind.

Coming to the core of the problem, the nature of the agreement that leads to binding obligation, some of the writers¹ speak of the need for intention by the parties to create rights and/or obligations between them in international law or to annul or modify ones already existing. Others² add to these the alternative requirement of an agreement with intent to establish relations, or to produce effects, in international law ('between the parties' must always be implied in these formulations); and yet others³ speak of intention to create an obligation or, as an alternative, the actual creation of an obligation, or indeed omit, as did the International Law Commission in its final draft,⁴ reference to intention altogether.

Professor Jennings,⁵ after acknowledging the need for a working definition, adopts the one cautiously drafted by Lord McNair:

... a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law.⁶

No assistance, it would appear, can be obtained from the use of the terms 'treaty and international agreement' in Article 102 of the United Nations Charter. The words there seem to have no specific or technical meaning, it having been agreed at San Francisco that no attempt at definition should be made. The United Nations Monthly Statement preface sets out the position taken by the Secretariat in this way:

... since the terms 'treaty' and 'international agreement' have not been defined either in the Charter or in the Regulations, the Secretariat, under the Charter and the Regulations, follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Article 102. Registration of an instrument submitted by a member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status...⁷

¹ For a general survey of definitions, see Foulke, *Treatise on International Law* (1920), vol. 1, pp. 405 et seq. Examples of writers employing the definition in question are: Fiore, *op. cit.* (above, p. 117 n. 3), s. 744; Kraus, *Recueil des cours*, 50 (1934-IV), p. 322; Cosentini, *Code internationale de la paix* (1937), s. 814; Despagnet, *Cours de droit international public* (1910), p. 676; Vellas, *Droit international public* (1967), p. 98.

² For example: L'Huillier, *Eléments de droit international public* (1950), p. 171; Rousseau, *Droit international public*, vol. 1 (1970), p. 63.

³ For example: Anzilotti, *Cours de droit international* (Gidel trans., 1929), p. 333; Oppenheim, *International Law*, vol. 1 (Lauterpacht, 8th edn., 1955), p. 877; Sen, *A Diplomat's Handbook of International Law and Practice* (1965), pp. 439 et seq.

⁴ See Doc. A/CONF. 39/11/Add. 2, pp. 7 et seq.

⁵ *Loc. cit.* (above, p. 118 n. 5), at p. 530.

⁶ McNair, *The Law of Treaties* (1961), p. 4. The Harvard Research Draft and American Restatement adopt similar definitions.

⁷ On the scope and history of Article 102 see Rosenne, 'United Nations Treaty Practice', *Recueil des cours*, 86 (1954-II), p. 281, and Brandon, *American Journal of International Law*, 47 (1953), p. 49.

While the question of accurate definition, of tracking down the essential requirements, does not appear to tax the minds of Foreign Office legal advisers nor to appear often in the centre-stage of international controversy, some conclusions can be drawn in terms of reason alone: most importantly, that a definition framed in terms of the parties' intention is to be preferred. For if the parties wish to make a non-binding agreement they are free so to do by making that intention plain: from the intention flows the force of bindingness. Whatever be the constitutive nature of the principle *pacta sunt servanda*, its coming into operation is a function of State volition.

It is all very well to say, as did members of the International Law Commission,¹ that to employ the term 'treaty' to denote 'an agreement under international law' implies, through incorporation of the phrase 'under international law', that the parties intend to bind themselves; but this is tautologous. In the end all that is said is that an international agreement is an agreement governed by international law.

A definition couched in terms of the parties' intentions must be favoured. Whether that intention should relate to the creation of rights and/or obligations (and it must be enquired whether a reference to rights is necessary at all: if an obligation is intended, a correlative right is implicit in it) or to establishment of a relationship or production of effects in law is not easy to say.

It is axiomatic that a binding agreement gives rise to an obligation on the part of at least one of the parties. It is the intention to pledge oneself to some act or omission that gives rise to the application of the principle *pacta sunt servanda*. If no 'obligation' is intended there can be no question of 'being bound'. These are general principles of law, as Sir Hersch Lauterpacht pointed out in his separate opinion in the *Norwegian Loans* case.²

Whether the words 'establish a relationship' or 'produce effects' adequately capture the essence of obliging, or putting oneself under a disability, is debatable. The proponents of such formulations seldom divulge what they mean by 'relationship'.³ Unless they mean a relationship constituted by binding obligations *inter se*, the term appears unduly vague and might cover, for example, a joint communiqué where two Foreign Ministers speak in political terms of their aspirations for future relations, an instrument not normally considered a treaty.

The essence of these definitions is agreement considered by the parties to be binding on them, an undertaking whose terms they must carry out. Another way to express the same idea, and this formulation draws attention to the real question that must be asked, is, are the parties (or is one of them) making serious promises or undertakings: undertakings that are intended to be acted upon and relied upon?

Yet however a definition be framed, whether in terms of intention or of the actual creation of an obligation or relationship, that gash in the side of the international system, the absence of a system of compulsory settlement of disputes, disgorges monstrous complications even at this stage. For without such a system how does one demonstrate intention to create a 'binding' rather

¹ Below, pp. 132-4. ² *I.C.J. Reports*, 1957, p. 9 at p. 49. ³ See Lauterpacht I, p. 100.

than a 'hope to fulfil' type of promise? Can it be assumed that a State is 'undertaking' when there is likely to be no impartial judicial settlement of any dispute arising out of the transaction and certainly no enforcement agency?

It was this dilemma that led Professor Fawcett to make his acute observations in this *Year Book* in 1953.¹ While conceding that he was writing largely *de lege ferenda*, Professor Fawcett stressed the need for greater care over form in international agreements so that the juridical character of an agreement may be more readily ascertainable. More ambitiously, he built up his own theory that there is no presumption that States, in concluding an agreement, intend to create legal relations at all and that this intention must be clearly manifested before legal character is attached to the agreement. He is using the term 'legal' in the sense of 'binding' undertaking.

Professor Fawcett touches upon the English Law of Contract and particularly the leading case on intention to create legal relations, *Rose and Frank v. Crompton*,² which appears to hold that parties to an agreement can make it binding 'in honour' only but that they must do so precisely and clearly. Further, the decision suggests that if the agreement is in the normal form of a contract there will be a presumption that the parties intended to create legal relations. These principles exist, Professor Fawcett shows, in all the major legal systems but they are not, in his view, equally applicable to the international system for two reasons:

(a) States and governments differ greatly from individuals in the type of business they transact by means of agreements: it is mainly of an administrative and technical nature resembling inter-departmental co-operation agreements, not in private law the subject of legal obligations.

Two criticisms can be made of this view. First, administrative and technical agreements form only one class (admittedly a large class) of international agreements. Secondly, the reason inter-departmental agreements are not usually enforced in municipal courts is not because they are treated as inherently different from ordinary contracts but rather because the parties are the same person-in-law, the State.

(b) The requirement of the consent of States for judicial settlement of international disputes raises the contrary presumption³ because there can be no general assumption of intention to create a legal obligation if there is no compulsory dispute settlement procedure.

¹ This *Year Book*, 30 (1953), p. 381.

² *Rose and Frank v. Crompton Bros.*, [1923] 2 K.B. 261 (in the Court of Appeal). This case is referred to by Dr. Münch in his article in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 30 (1969), p. 1. His conclusion is that the case, and all those of its kind, shows only that the opinion of the parties regarding the effect and force of their agreement is insignificant. The true position seems to be the reverse: in business dealings the English courts will assume intention to create legal relations; in social affairs they will assume the opposite. But either presumption may be defeated by a clear indication of the intention of the parties: see Bankes L.J. at p. 282. See also Treitel, *The Law of Contract* (4th edn., 1975), pp. 97 et seq.

³ A similar controversy rages in Anglo-American labour law. In the labour law context the normally efficient enforcement-settlement system has collapsed because one of the parties to the dispute has, in the *de facto* sense, more power than the system itself.

This second argument can be dismissed with the theoretical response that it confuses substantive legal norms with access to a particular remedy. (And if one is speaking in practical terms, as Fawcett appears to be, surely it is enforcement that is important, not access to legal machinery for dispute-settlement. There is no adequate enforcement procedure over any category of agreement under international law.)

Even after dealing with this view, however, the dilemma remains: what are the criteria of a legal agreement? We can only return here to the formulation raised earlier: if the parties agree and one or both of them is or are obliged to act in a certain way, in other words if the promise or promises is or are serious and intended to be acted upon, a legal, rather than political, relationship is established. Clearly this view implies that the principle *pacta sunt servanda* is accepted as a legal directive whether or not the *pactum* in question is the subject of an agreed dispute settlement procedure.

Thus the severity of Professor Fawcett's system is rejected but the legitimacy of its intellectual bases acknowledged. The system will later be tested against some tentative conclusions from the relevant State practice.

Having stated his theory, Professor Fawcett continues by setting out a number of cases in which intention to create legal relations will, in his opinion, be manifested:

(i) where there is provision in the agreement for compulsory judicial settlement of disputes;

(ii) where both parties have accepted in advance the jurisdiction of the International Court of Justice and that acceptance covers disputes concerning the application or interpretation of the agreement in question;¹

(iii) where the subject-matter of the agreement demonstrates an intention on the part of those concluding it that it be governed by international law. As examples of this third category Professor Fawcett cites constitutions of international organizations, conventions touching rights and obligations under private law and those operating under a framework of accepted rules of international law, such as consular conventions.

The precise ambit of class (iii) is unclear. In one sense all international agreements intended to create binding obligations operate under a framework of accepted rules of international law, the rules of treaty law, but this is obviously not what Professor Fawcett has in mind. His illustrations tend to suggest that the agreements he is discussing are those of specific and particular obligation, customs, navigation, consular, diplomatic and so on, but the only inherent difference between these agreements and those such as scientific and cultural co-operation conventions is that one set of obligations is likely to be more

¹ There is just the tiniest support for Professor Fawcett in a curious passage by Denmark in the Pleadings for the *Eastern Greenland* case (*P.C.I.J. Documents*, vol. 62, p. 112), where the following is found (to be read bearing in mind that one allegation was that Norway had breached the terms of certain agreements with Denmark): 'Étant donné qu'il existe entre les deux pays des traités d'arbitrage et autres qui les obligent à faire résoudre par voie judiciaire tous différends qui pourraient s'élever entre eux . . . la déclaration Norvégienne . . . constitue un acte illicite.'

specifically delimited. This latter set of agreements will be investigated below at greater length and it will be suggested that, despite broad drafting, discernible obligations are often undertaken. Why, then, should a cultural convention differ juridically from a consular convention?

Professor Fawcett rejects a fourth possible test, registration under Article 102 of the United Nations Charter, for the reasons (a) that neither Article 102 of the Charter nor the Regulations made under it define 'treaty' or 'international agreement' and do not therefore require there to be evidenced an intention to create legal relations and (b) that registration is not a mandatory requirement of being 'a treaty or international agreement' but is rather a condition precedent of agreements being considered by United Nations organs.

To conclude, Professor Fawcett analyses those agreements which contain provisions appearing to negative any intent to create legal obligations—provisions which in one way or another leave it to the parties or one of them to determine the extent of the obligation they have assumed. Terms such as 'subject to the law in force' (a formula sought by the Soviet Union to be inserted into the Human Rights Conventions), or 'to assist by such action as it deems necessary' (Article 1, North Atlantic Treaty), can, he claims, in most cases amount to no more than a declaration of policy or goodwill 'for an obligation cannot be properly called a legal obligation unless its existence and extent are determinable judicially'.

It has already been suggested that a promise, or exchange of promises, cannot be considered binding if no obligation is thereby undertaken. If the promise is so hedged with reservations and self-judging riders that it cannot be truly said to be a promise at all, there is no substance to pour into the agreement form, and it must be assumed that no obligation was intended. It might be going too far to speak of this requirement, as some do, as a 'general principle of law', basing it on the premiss common to all legal systems,¹ that obligations undertaken must be capable of judicial ascertainment. In a system where compulsory jurisdiction is not established, it is clearly more accurate to talk in terms of evidence of intention of the parties. But whether Professor Fawcett's examples are really of this non-legal character is debatable. The clause 'subject to the law in force' cuts down the size of the obligation that might otherwise have arisen but cannot be said to annihilate it completely. There is something left, something ascertainable by both parties, a discernible realm of obligation.

Another difficulty with Professor Fawcett's approach is that in concentrating unduly on the provision of *ante hoc* submission of disputes to a tribunal, it ignores the fact that the parties to an agreement can, at any time, agree to submit a dispute to the Court or an arbitral tribunal. If both parties trust each other's seriousness they will not have excluded the possibility of *post hoc* submission.

There appears to be no distinction made in the practice of States between those treaties subject to a system of compulsory dispute settlement and those not so subject. And, in connection with Fawcett's second class of binding agreements, is it really suggested that Foreign Offices link their treaty-making with acceptance

¹ Below, p. 130.

of the Optional Clause of the Statute of the International Court of Justice? Certainly, Foreign Office treaty lists do not reflect these distinctions.

In a survey of 'treaties and international agreements' registered with the Secretary-General of the United Nations in the five years between 1967 and 1971 (Volumes 588-799 of the *United Nations Treaty Series*)¹ some 2,400 bilateral and plurilateral instruments (plurilateral in the sense of more than one entity on one side but undertaking jointly as a single group, e.g. Benelux) were studied. Out of this figure only approximately 450 (fewer than 20 per cent) contained dispute settlement clauses of the type envisaged by Professor Fawcett.² This figure can be broken down thus:³

<i>Type of Instrument</i>	<i>Percentage Containing Dispute Settlement Clause</i>
Treaty	5
Convention	7.5
Agreement	33
Exchange of notes/letters	1.5
Others	0

The most interesting aspect of this part of the survey is that, in the case of agreements and exchanges of notes, the subject-matter of both of which was wide-ranging and intrinsically alike, they were treated so differently in the matter of inclusion of dispute-settlement clauses. This, however, is most sensibly explained by the fact that 'Agreement' is the form of instrument used by the International Bank for Reconstruction and Development and by the International Development Association for loan and guarantee transactions with States, as well as the form recommended by the International Civil Aviation Organization for civil aviation agreements between member States. These number probably over 30 per cent of all 'agreements' registered. All (or nearly all) of them contain a compulsory dispute settlement clause.

¹ A few volumes (six) were not at the time available, but the remaining ones are considered representative of registration practice in the period. Sometimes a bundle of instruments would be registered at the same time and given a single number in the series. In such cases, usually involving a major convention or agreement followed by a protocol or exchange of notes, spelling out, interpreting or even amending certain provisions of the master agreement, we have included in the survey only the master agreement. The subsidiary instruments concern the same transaction and are usually expressed to be an integral part of the master agreement, it being the master agreement which contains provisions on termination, dispute settlement and so on.

² While Professor Fawcett has argued that registration is not indicative of intention 'to create legal relations', this is a view with which we disagree for reasons given later in the Article. But even assuming he is correct, if any conclusions at all are to be drawn from State practice, they can only be based on the *United Nations Treaty Series* (of registered treaties and international agreements) as the only comprehensive collection available. It must be assumed that even if Professor Fawcett is correct, nearly all of these instruments are intended to be binding.

³ In the case of multilateral instruments, the conclusions were as follows: Treaties 0; Conventions 20%; Agreements 33%. The percentages here are higher, presumably because most of these instruments are concluded within international organizations where the organization itself may have a policy on compromissory clauses. The Secretariat of the organization might even have drafted the instrument.

With this in mind, the low percentages in all forms of instrument do not suggest that States believe that inclusion of a compulsory dispute settlement clause is of significance in ascertaining the legal status of the instrument.¹ It can, of course, be argued that many of the instruments not containing such a clause will be covered by declarations under Article 36 (2) of the I.C.J. Statute, but recalling the fact that fewer than one third of U.N. members have filed declarations, the vast cavities of reservations hollowed out of them and the necessity for both parties to a dispute to have lodged declarations in terms covering the particular dispute in question, it seems unlikely that the figures would be much improved.

Apart from the I.B.R.D., I.D.A. and I.C.A.O. instruments mentioned above, there were no specific subjects on which a dispute settlement clause was relatively more often to be found.

The most obvious conclusion from the survey was that in about 99 per cent of the instruments containing a dispute settlement clause, at least one of the parties was a Western country (West European, North American, Australasian), most often the U.S.A., France, the Netherlands and Denmark. This indicates, it is submitted, that the use of such a clause is more related to one of the parties' views on the compulsory settlement of disputes in international law generally.²

* * *

Some of these tentative conclusions on the nature of 'international agreement' will now be supported by the Reports of the Special Rapporteurs on Treaties in the International Law Commission. The Commission's involvement in studying the law of treaties lasted some sixteen years and it is perhaps most sensible to look at the Reports seriatim.

The first Special Rapporteur (Professor Brierly) defined 'treaty', for the purposes of the draft articles, as 'an agreement recorded in writing . . . which establishes a relationship under international law'. Paragraph 19 of his commentary makes it clear that by 'establishment of a relationship' the Special Rapporteur meant creation of rights and obligations, but no criteria or tests are suggested.

The Special Rapporteur accuses the Harvard Research Draft on Treaties of excessive ambit in including instruments which merely seek to establish a relationship under international law, stating that if no rights or obligations are established there can be no legal act. But according to the Commentary of the Harvard Research Draft, what was being attempted was to find a term which included within it both rights and obligations at the same time.³ However, in so far as there is a suggestion in the Harvard Commentary to Article 1 that there may be 'treaties' not giving rise to rights or obligations, one could agree with Professor Brierly. It should be noted that when intention to create an obligation

¹ See p. 125 n. 2, above.

² Of the present parties to the optional clause of the I.C.J. Statute, nearly half are Western European Union members and about one-fifth Latin American.

³ Loc. cit. (above, p. 117 n. 3). If an obligation is intended, a concurrent right will *ipso facto* be intended. As long as there is agreement, there need not be obligations on both sides. There is certainly no doctrine of consideration or *causa*.

is spoken of it is not necessarily a provision to act immediately. The obligation to act or not to act may relate to the future as in the case, for example, of an undertaking 'to allow free passage when demanded' or, as in the case of many law-making treaties, it might be a continuing obligation (for example, to respect another State's claim in a particular matter).

Discussion in the Commission about this draft Article was frustrated by an outbreak of confusion over the place of municipal law concepts of 'treaty',¹ and a cloud of ambiguity was thrown over the scope of the articles by Professor Scelle and others who refused to acknowledge, for example, that an exchange of notes constituted a 'treaty' (presumably in the narrow sense, but the fact that the debate took this course is some indication of the terminological confusion inherent in these terms).

Professor Brierly was succeeded in 1952 by Professor (later Sir Hersch) Lauterpacht who made it clear at the very outset that his draft articles were to apply to all forms of international agreement.

Draft Article 1 provided that:

Treaties are agreements . . . intended to create legal rights and obligations of the parties

and Article 2:

Agreements constitute treaties regardless of their form and regardless of whether they are expressed in one or more instruments.²

In his Commentary,³ the Special Rapporteur stressed that his main purpose was to exclude from his definition instruments in the nature of statements of policy, the test for distinguishing between the two types of instrument being one of intention. Capacity to carry out that intention was a relevant consideration within the test: for if the act promised was incapable of being rendered, this would suggest a lack of intention to bind.

As an example of a non-binding agreement the Special Rapporteur cited the Communiqué of the Moscow Conference of 26 December 1945.⁴ This lack of bindingness in law Lauterpacht derived from a statement in the Communiqué that the discussions 'took place on an informal and exploratory basis'. Nonetheless

¹ *Yearbook of the International Law Commission*, 1951, vol. 1, pp. 13 et seq.

² Lauterpacht I, pp. 93 et seq.

³ Ibid., pp. 93 et seq., and see Lauterpacht II, pp. 123 et seq.

⁴ *United Nations Treaty Series*, vol. 20, p. 272. Another example he gives is that of an exchange of notes reported in the *Department of State Bulletin* of 7 September 1940 (vol. 3, p. 195). On 4 June 1940 the Prime Minister of the United Kingdom issued a statement to the effect that should the British Isles become untenable for British ships of war, the British fleet would in no event be surrendered but would be sent overseas for defence of other parts of the Empire. On 29 August 1940 the following enquiry was received by the British Ambassador to the U.S.A.: 'The Government of the U.S.A. would respectfully enquire whether the foregoing statement represents the settled policy of the British Government.' An affirmative answer was given. It is difficult to conceive of such an exchange as constituting a binding agreement. It is surely no more than an enquiry from one Government to another about future policy in war-time: a contingent matter. The British reply does in fact refer to hypothetical contingencies. In any case the obligation, if one existed, would seem to be more in the nature of a unilateral undertaking by Great Britain, the U.S.A. being an enquirer rather than party to an agreement.

the Communiqué does speak of 'agreement' and uses words of obligation in some clauses:

- ... have agreed to meet regularly;
- ... have agreed to the following procedures with respect to the preparation of the Peace Treaties;
- ... have agreed to establish a Far East Commission and a Council of Japan.

Other clauses were less likely to have been intended to be binding: '... the three Foreign Secretaries exchanged views on China and were agreed on the need for a unified China ... they reaffirmed their adherence to a policy of non-interference in internal affairs ...'. Such formulations as these give some indications of the problems involved in ascertaining the intention of the parties.

Lauterpacht's Commentary notes with impeccable logic¹ that the fact that the obligation provided for in the instrument can be fulfilled by a somewhat nominal act of the parties does not detract from its character as a treaty (e.g., an obligation to consult). It is for the parties to limit the extent of the obligations flowing between them. Similarly, an undertaking to negotiate implies a legal obligation so to do although it usually leaves a wide measure of discretion to the State bound by it.² A legal duty must also, he writes, be deemed to exist in those marginal cases in which, by virtue of the instrument in question, a State reserves for itself the right to determine both the existence and extent of the obligation undertaken by it³ as, for instance, in the case of some declarations of acceptance of Article 36 (2) of the Statute of the I.C.J. in which the declaring States have reserved for themselves the right to determine whether a matter falls within their domestic jurisdiction. Such a determination must take place in accordance with the implied obligation to act in good faith.⁴

Professor Lauterpacht was obviously concerned lest his formulation result in uncertainty, for in his second Report he submitted for consideration the question whether it might be desirable to add to draft Article I the following words:

In the absence of evidence to the contrary an instrument finally accepted by both parties in the customary form of an international undertaking and registered with the United Nations in accordance with Article 102 of the United Nations Charter shall be deemed to be an instrument creating rights and obligations.⁵

The Special Rapporteur repeated his observation that the fact that the scope of the obligation is elastic is not a decisive factor for denying that there is in existence a legal duty to be fulfilled in good faith: the same considerations must apply as would to agreements allowing both parties to suspend, temporarily

¹ At p. 124.

² E.g., the *Tacna-Arica* decision. See Lauterpacht I, p. 97, n. 11.

³ This, the Special Rapporteur writes, is also the position with agreements such as the North Atlantic Treaty of 4 April 1949 in which each party agrees to assist others by such action as it deems necessary in cases of attack against them. Such a provision does not exclude the final impartial determination of the legitimacy of the action then taken. Cf. Fawcett, loc. cit. (above, p. 122 n. 1), pp. 391 et seq., and see below, p. 139.

⁴ Cf. Judge Lauterpacht's separate opinions in the *Norwegian Loans* and *Interhandel* cases, below.

⁵ Lauterpacht II, p. 123. Registration, he says, should not be considered decisive but weight should be attached to it.

or fully, the agreement on immediate notice. Lauterpacht II contains many examples of broadly drafted clauses in treaties, all considered by the Special Rapporteur to contain some element of binding obligation.

In a reply to Fawcett, Lauterpacht states quite firmly that there is no warrant for the suggestion that instruments do not, on account of either the large measure of discretion inherent in their application or of their purely administrative character, exhibit the essential characteristics of an international treaty. As to the importance of a dispute settlement clause, Sir Hersch rests content with the observation that there was no reason why requirements in the law of treaties should be higher than in any other branches of the law.¹

Sir Hersch Lauterpacht became a Judge of the International Court of Justice before his draft articles were considered by the Commission. His place was taken in 1955 by Sir Gerald Fitzmaurice.

Soon after taking his place in the International Court of Justice, Judge Lauterpacht's views on elasticity in obligation were put to the test in two cases. Both involved the efficacy of reservations to declarations made under Article 36 (2) of the Court's Statute.

In the first, the *Norwegian Loans* case,² France took action against Norway. Norway claimed the right to take advantage of a French reservation excluding 'matters which are essentially within the national jurisdiction as understood by the Government of the French Republic'. While the majority of the Court understood Norway to be relying on the self-judging nature of the reservation (although Norway for the most part argued that under international law, the matter was one of domestic jurisdiction),³ the validity of the reservation or the declaration as a whole was not questioned by either party. This is an odd matter in itself, for if such a declaration is invalid as containing no obligation, the Court would have no jurisdiction. The Court is under a duty to ascertain that it does indeed have jurisdiction in cases brought before it.⁴

Some of the separate opinions, however, raised the question. Judge Guerrero⁵ thought that the French declaration conformed neither to the spirit of the Statute nor to paragraphs 2 and 6 of Article 36 and that the reservation was thus void; it ceased to be compulsory jurisdiction if France rather than the Court held the power to determine. It was also in conflict with Article 36 because there was no real obligation to submit the matter to the Court's jurisdiction.

Judge Read, on the other hand,⁶ considered that, properly construed, the French declaration meant that the Respondent State must establish that there was a genuine understanding, i.e. that the circumstances were such that it would be reasonably possible to reach the understanding that the dispute was essentially national, whether the circumstances were such being a matter for decision not by

¹ Ibid., p. 126.

² *I.C.J. Reports*, 1957, p. 9.

³ In fact Judges Basdevant and Read based their decisions on the assumption that Norway had not in fact wished to press this argument (at pp. 71 and 79 respectively).

⁴ Judge Lauterpacht raised this point at p. 61. It could be argued that, in so far as the point was not argued by the parties, this could be considered a waiver by Norway, giving rise to implied consent, *pro tanto*, to jurisdiction.

⁵ Pp. 67 et seq.

⁶ Pp. 94 et seq.

national government but by the Court.¹ One is tempted to agree with this viewpoint, for 'understood' has indeed a core of objective meaning, far more so than the word 'claimed', for example.

Judge Lauterpacht in a very long separate opinion² maintained with vigour that the Court had acted in disregard of both its Statute and Article 92 of the United Nations Charter, which lays down that the Court shall function in accordance with the provisions of its Statute.

Judge Lauterpacht had two grounds for his views. The first is that, as the Court cannot act other than in accordance with its Statute, an acceptance of jurisdiction in these terms was a clear contradiction of the Statute and therefore invalid. States were free, he said, to make reservations but the question whether 'the little that is left' was or was not subject to the jurisdiction of the Court must be determined by the Court itself.

This argument, concerned with interpretation of the Court's Statute, does not appear convincing. One finds force in the counter-argument that the Court is still free in such a case to determine its jurisdiction: however wide the words employed, they must still be interpreted.

The second ground³ is that the automatic reservation was invalid because it lacked the essential conditions of validity necessary in a legal obligation. In reality the French Republic had undertaken no obligation and there is a 'general principle of law' that an undertaking in which one party reserves for itself the right to determine the extent or the very existence of the obligation is not a legal undertaking. 'It is irrelevant', Judge Lauterpacht added, 'that having regard to public opinion, an enlightened State is not likely to invoke any such reservation capriciously, unjustifiably or in bad faith. These are expectations which may or may not materialise.'

While the result achieved by this approach is agreeable it would, for reasons given earlier, be preferable to base such a finding on the implication that an undertaking so hedged with self-judging reservations is not intended to be serious or binding, rather than on a general legal principle more appropriate to a compulsory municipal system.

Judge Lauterpacht next dealt shortly with the view that, in such cases, the State must be considered to be under an obligation to act in good faith and, to that extent, there is in existence a valid legal obligation. In so doing he reversed the position he took in the International Law Commission, admitting that after further study he could not support that view. If no room is left for an impartial finding whether the duty to act in accordance with 'good faith' has been fulfilled, then the requirement to act in 'good faith' has no meaning.

With respect, this is tautologous: if the 'good faith' requirement is incorporated into the obligation, then there is indeed something to grasp. Judge Lauterpacht seems to be saying that France has excluded the Court's power of jurisdic-

¹ He supports his view by the plain terms rule of interpretation. Recent cases in English Administrative Law clearly demonstrate the Courts' ability to find objective meaning in words like these.

² *I.C.J. Reports*, 1957, pp. 34 et seq.

³ *Ibid.*, pp. 48 et seq.

tional determination therefore there can be no investigation of *fides*. It can be replied that if France were under an obligation to make a determination in good faith (it is assumed that to act in good faith is not inconsistent with the actual words used), there must be room for the Court to investigate and reject extremely capricious and extravagant action.¹

Judge Lauterpacht concluded that the reservation was invalid and, being an essential part of the French Government's consent to be bound, not separable. The whole Declaration was invalid.

In the second case, *Interhandel*,² the majority did not need to consider Swiss arguments based on the American Connally Clause. Judge Lauterpacht³ in another strong separate opinion, however, repeated the views he had expressed in *Norwegian Loans*. This time he traced the history of the formulation of the United States' reservation and found no ground for the suggestion that its plain meaning could be limited by concepts of reasonableness or good faith. It was simply not so intended.⁴

Judge Spender⁵ agreed with Judge Lauterpacht for the same reasons and added, somewhat gratuitously, that Judge Read would not, on the particular formulation now before the Court, have been able to imply an obligation that the determination must be 'reasonable'. Nor was there room, from the plain terms of the reservation, to add a duty to act in good faith.

The President, Judge Klaestad,⁶ agreed but felt the offending reservation could be severed because the declarant party doubtless wished to be in a position to sue other States: this was the clear purpose of the declaration. The reservation was a subsidiary matter.⁷

The next stage of the I.L.C. process was Fitzmaurice I in a different form from that of any other Rapporteur: a draft code, impeccably logical, containing copious commentary and opening with the following two Articles:

(1) The present code relates to treaties and other international agreements in the nature of treaties embodied in a single instrument and to international agreements embodied in other forms . . . provided always that they are in writing.

The present code does not as such apply to international agreements not in written form the validity of which is not, however, on that account to be regarded as prejudiced.

(2) For the purposes of the application of the present code, a treaty is an international

¹ Judge Lauterpacht says that an enquiry into 'good faith' would end up becoming an enquiry into the merits, not possible at the jurisdictional stage. This need not be so: a better analogy is that with an application to the Court for provisional measures of protection where a *prima facie* case on the merits may have to be made out. In any case, an enquiry into the decision by a State to 'understand' a dispute as involving national jurisdiction need not necessarily touch upon the legal merits of the dispute at all.

² *I.C.J. Reports*, 1959, p. 6.

³ *Ibid.*, pp. 95 et seq.

⁴ All these views will be further considered later.

⁵ *I.C.J. Reports*, 1959, pp. 55 et seq.

⁶ *Ibid.*, pp. 75 et seq. Judge Armand-Ugon agreed with this view, pp. 91 et seq.

⁷ It seems difficult to summon up a good argument in favour of severance. The reservation was certainly intended to percolate throughout the declaration. It was not really a reservation at all, more an integral part of the declaration.

agreement embodied in a single formal instrument intended to create rights and obligations or to establish relationships governed by international law.¹

Thus the Special Rapporteur has defined 'treaty' narrowly but not limited his draft articles to such instruments.²

So far as concerns a test for discerning a treaty obligation, Sir Gerald has, in Article 2 (1), added to the Lauterpacht formula the earlier Brierly I criterion of 'intention to establish a relationship' because 'it seems difficult to refuse the designation of treaty to an instrument such as, for instance, a Treaty of Peace and Amity or of Alliance even if it only establishes a bare relationship and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved'.³

One senses that Sir Hersch Lauterpacht's reply would have been, and rightly, that if such an implication must be made, then there are indeed rights and obligations intended to be created. Moreover, if treaties of peace are not intended to give rise to rights and obligations, nothing is.

Sir Gerald did not adopt Lauterpacht's proposal concerning the effect of registration. First, in regard to the fact of registration with the U.N.,⁴ he thought that because Article 102 provided that only a 'treaty or international agreement' was registrable, such instruments must have this character before the obligation to register would arise. (Is this not an argument for, rather than against, the Lauterpacht formulation?) Secondly, such a test or presumption would be dangerous in a system where registration is by one party only in most cases.⁵

From our point of view the most interesting debate within the Commission took place over the passage 'intended to create rights and obligations or to establish relationships governed by international law.'

Professor Ago⁶ wondered whether it might not be better to find a more general formulation. Were agreements intended to establish rules rather than to create directly rights and obligations covered by it? And agreements dealing with interpretation of an earlier treaty or settlement of a particular dispute? And Mr. Alfaro⁶ added to this list agreements amending, regulating or terminating rights.

Sir Gerald agreed that all these instruments must be subject to the draft articles. He had, rightly it is submitted,⁷ assumed they were. His main concern

¹ In order to avoid the problem faced by Professor Brierly in the early Commission debates (confusion between international and municipal concepts), the Special Rapporteur provided in draft Article 2 (4) that the fact that an instrument is or is not, as the case may be, regarded as a treaty for the purpose of the present code does not in any way affect its status in relation to the constitutional requirements of particular States.

² There was some concern in the Commission in 1959 (*Yearbook of the International Law Commission*, vol. 1, pp. 4 et seq.) concerning the way in which the Special Rapporteur had treated upon all forms of international agreement. The extreme doctrinaire views prevalent at the discussion on Brierly I seem, however, to have been dissipated. At the 485th Meeting (*loc. cit.*, p. 26) the Special Rapporteur re-entitled his definition section: 'Definition of International Agreement' to make his position even clearer.

⁴ See p. 128 above.

⁵ These arguments will be considered later.

⁶ *Yearbook of the International Law Commission*, 1959, vol. 1, p. 34.

⁷ Above. If the agreement is intended to establish rules, the rules must create obligations. Even the great law-making conventions begin as obligations and rights (rules) for the parties.

had been to except agreements subject to some legal system other than the international one. He suggested that a more general formula, if such were required, might be, 'the provisions of which are intended to be governed by international law'. Or, as another alternative, he suggested insertion of the words '. . . or to produce effects' after the word relationship in the final draft. The articles were referred to the Drafting Committee and, as Sir Gerald was elevated to the bench soon afterwards, time stood still until Sir Humphrey Waldock produced his first Report in 1962.

Article II of Sir Humphrey Waldock's first Report contains the following provisions on use of terms:¹

- (a) 'International Agreement' means an agreement intended to be governed by international law;
- (b) 'Treaty' means any international agreement in any written form whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The Special Rapporteur has, then,² in contradistinction to Sir Gerald, widened the term 'treaty' so as to include, for example, an exchange of notes. He is dealing with the law of treaties. Sir Gerald dealt with the law of international agreements. The scope of both drafts, however, is essentially the same.

Sir Humphrey's criterion, 'intention to be governed by international law', beneficially salvages the intention test but otherwise is a wide formulation leaving as much hidden as it reveals.

The Commission debated Waldock I during its 1962 session.³ Following suggestions that description of the terms 'treaty' and 'international agreement' might sensibly be combined, the Special Rapporteur produced a new simple text reading:

Treaty means any international agreement in any written form whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . . which is intended to be governed by international law.⁴

Mr Tsuruoka⁴ asked why the words 'intended to be . . .' were necessary. Mr. Gros replied, correctly it would seem, that whatever wording was adopted in the Commission, the intention of the parties would always have to be sought in

Similarly, an agreement interpreting an earlier agreement contains an obligation: the parties are no longer free to interpret the earlier agreement in any other way. Agreements for the settlement of disputes oblige the parties to settle the dispute in the manner agreed. Mr Alfaro's examples of agreements regulating, amending or terminating can be treated likewise. Any agreement intended to alter a previous obligation must contain within itself an obligation of like force.

¹ Sir Humphrey was often at pains to point out that he was not dealing with absolute definitions but the use of terms for the purpose of his draft articles.

² The Special Rapporteur states that the term treaty in the narrow sense probably constitutes a particular type of international instrument consisting of a single formal instrument and commonly subject to ratification but that the law of treaties applies to many other forms of agreement. In justifying his use of the term treaty in the wider sense, he refers to Article 36 (2) of the Statute of the I.C.J. where the term is used generally. He follows Sir Gerald in providing that the use of terms in the draft articles is without prejudice to their meanings in municipal constitutional law.

³ *Yearbook of the International Law Commission*, 1962, vol. 1, pp. 46 et seq.

⁴ *Ibid.*, p. 51.

order to ascertain whether any given agreement was meant to be governed by international law. Professor Ago, however, wished to see the reference to intention deleted, claiming that it implied that the parties were free to decide whether a treaty would or would not be governed by international law.

It is, of course, the view of this writer¹ that a reference to intention is desirable. Professor Ago's contention can be met with the reply that even if there is a class of agreements which cannot be subjected to any legal system other than the international one, it still remains to be shown that the parties intended to create a legal obligation, a binding undertaking. And the number of agreements which can be submitted to no other legal system than the international one must be small indeed.² Mr. Yasseen,³ in the same debate, thought it inconceivable that an agreement concerning territorial seas should not be subject to international law, whatever the will of the parties. This must be true only to the extent that to alter or to transfer rights in international law, an international legal agreement is necessary; but it is not inconceivable that State A might wish to grant, under its own municipal law, some rights to State B over its territorial sea resources.

In short, it is difficult to contemplate that there is a large class of agreements which can be submitted only to international law and, even more important, it is denied that the existence of such a class would prove in any way that the parties' liberty to agree, without binding themselves, is dependent on something other than their own intention.

The Special Rapporteur, however, agreed, a little too readily, to delete the 'intention' formula 'if misunderstandings might be caused by it'.⁴ The Drafting Committee formally extinguished it.

This, then, leaves the definition, or use of terms provisions, in a tautologous and unhelpful state. Despite Mr. Amado's pointing out⁵ that there was now no real working definition (it had been reduced to the proposition that 'an international agreement is an agreement governed by international law'), the revised article was adopted by the Commission.

Sir Humphrey's fourth Report⁶ consisted of remarks and amendments made in the light of comments by Governments. Both Australia and Austria felt deep concern over the scope of the term 'treaty'. Australia foresaw a danger that the revised article might include within its ambit informal understandings not intended to give rise to legal rights or obligations. The intention test would, it was thought, have provided greater protection. Austria and the United Kingdom made similar suggestions and Luxembourg noted the tautologous nature of the draft scope article.

In reply, Sir Humphrey traced the history of the formulation as it now appeared, stressing his opinion that the term 'governed by international law'

¹ Above, p. 121.

² If any. The example given by Professor Ago is a treaty of cession. This might constitute the only example.

³ *Yearbook of the International Law Commission*, 1962, vol. 1, p. 52.

⁴ *Ibid.*, p. 53. Sir Humphrey expressed some feelings of regret at the deletion during the Second Session at Vienna, below, p. 135 n. 7.

⁵ *Ibid.*, p. 169.

⁶ At pp. 10, 11 and 12.

conveyed within it the requirement of intent. At its 810th meeting, on 24 June 1965,¹ the Commission adopted the revised article:

I (a). 'Treaty' means an² agreement in written form governed by international law whether embodied in a single instrument or two or more related instruments and whatever its particular designation.

In the Sixth Committee of the United Nations General Assembly in 1962, and 1966, and again in 1967, and in the later replies and views of Governments the wish by many to return to a formula involving 'intention' was strongly expressed, as was a wish by some to return to a 'definition' containing an express reference to the creation of obligations.³

Following resolution 2166 (XXI) of the General Assembly, an international conference on the law of treaties was held in Vienna in 1968 and 1969. The procedure adopted by the Conference involved formation into a Committee of the Whole which proceeded mainly by way of article by article discussion of the draft and of amendments submitted. After consideration, and a vote if necessary on principle, articles were referred to the Drafting Committee, returning to the Committee and finally to Plenary for adoption.⁴

On Article 2, the renumbered scope article, a number of delegations tabled amendments⁵ in favour of reinsertion of a clause along the lines of 'producing legal effects' or 'creating rights and obligations' or 'establishing a relationship', all of these more explicit than 'governed by international law', but not necessarily adding significantly to the definition. Malaysia and Australia⁶ spoke in favour of an intention test⁷ but by and large the argument was unproductive. Further consideration was postponed to the Second Session where Switzerland tabled a further amendment adding the words 'providing for rights and obligations' after the words 'international agreement'⁸ for the reason that the draft article was silent on agreements such as declarations not intended to have legal effect.⁹

The Soviet representative¹⁰ savagely attacked the Swiss proposal claiming that by limiting the notion of a treaty to agreements which provided for rights and obligations, it would exclude important legal agreements such as the Atlantic

¹ *Yearbook of the International Law Commission*, 1965, vol. 1, p. 244.

² The Drafting Committee's formulation of 'any' was changed to 'an' on the suggestion of Mr. Briggs in order to attenuate, to some extent, the worries of Australia and Austria.

³ In the 1962 debate in the Sixth Committee (*General Assembly Official Records*) Colombia (714th meeting) raised the question of circularity in the use of terms, as did Ceylon in 1966 (908th meeting), and Chile (912th meeting) and, in 1967, Tunisia (981st meeting) strongly desired a return to the creation of rights and obligations test.

⁴ See Report of the Committee of the Whole, *U.N. Conference on the Law of Treaties, Official Records*, A/CONF. 39/11/Add. 2, p. 101.

⁵ Chile, Malaysia, Mexico (A/CONF. 39/11/Add. 2, p. 111), New Zealand (A/CONF. 39/11, p. 29) and the U.K. (A/CONF. 39/11, p. 10).

⁶ *Ibid.*, pp. 28 and 29.

⁷ Sir Humphrey Waldock (*ibid.*, p. 34), when it was decided to postpone consideration of draft Article 2, spoke regretfully at deletion of the intention test.

⁸ A/CONF. 39/11/C.384/Corr. 1.

⁹ A/CONF. 39/11/Add. 1, p. 225. Examples given by Switzerland were the Three Power Declaration on Moroccan Affairs made at Madrid in 1907, the Atlantic Charter, the 1943 Declaration on Despoliation and the 'Gentleman's Agreement' on U.N. Security Council seats.

¹⁰ A/CONF.39/11/Add. 1, p. 226.

Charter (mentioned by Switzerland as an example of an agreement not having legal effect), the Potsdam and Yalta Agreements, all of which not only provided for rights and obligations (if they did, there should be no Soviet qualms about the Swiss proposal) but also laid down very important rules of international law. Chile¹ supported Switzerland in seeking to distinguish an international agreement from an agreement merely recording identical views and general aspirations: States should not have to hesitate to express in writing their long-term political goals for fear they might be bound by such instruments. The United Kingdom, too,² supported Switzerland and thought the U.S.S.R. to be adopting too broad a view; there had always been a distinction between international agreements so-called, intended to create rights and obligations, and declarations simply setting out policy objectives. In any case, the United Kingdom representative added, the Soviet representative's view was not shared by the Academy of Sciences of the U.S.S.R.³

The amendments were referred to the Drafting Committee which, in oracular fashion, pronounced them superfluous,⁴ claiming that the expression '... governed by international law' comprised the element of intention to create legal obligation. After reconsideration by the Committee of the Whole, the draft article was formally adopted by the Conference.

In view of the chequered history of Article 2 and the myriad of assurances that whatever formulation was adopted an examination of the intention of the parties would be necessary to ascertain both that they had intended to be bound and that they had intended to be bound under the international rather than another legal system, it would be pedantic to continue to criticize the formulation adopted at Vienna and those maintained by the text-writers.⁵ They may be guilty of tautology but whatever form of words they adopt, the freedom of the parties to evade 'bindingness', or to submit their agreement to a particular legal system out of all those available has to be recognized.

* * *

¹ Ibid., p. 227.

² Ibid., pp. 227-8.

³ A reference to the Academy's text on International Law which takes the orthodox approach to the definition of treaty (ed. Kozhevnikov).

⁴ A/CONF. 39/11/Add. 1, pp. 345-6.

⁵ One serious contribution to the work in this field, however, remains to be mentioned. It is that by Dr. Münch, in an article in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 30 (1969), p. 1, when the author takes to task the International Law Commission for not paying more explicit attention to the requirement of 'intention to create legal relations'. Dr. Münch's survey of writing in the field indicates that virtually all writers admit the existence of non-binding agreements. He gives a number of illustrations of non-binding agreements, including a 1907 Exchange of Notes (called a Declaration of Policy) between France and Spain concerning the status quo in the Mediterranean and Northern Atlantic which was expressly stated not to be a 'treaty'. Other of his illustrations are certain of the Allied declarations concluded towards the end of the Second World War. He also mentions the recommendatory expressions and *vœux* that often find a place in the Final Acts of Conferences. The point of Dr. Münch that the 'definition' adopted by the I.L.C. is a long way from perfect is accepted. His anxiety that 'intention to bind' may no longer be considered a requirement for an instrument to be classed as a treaty or international agreement is not, however, compelling. It has been noted that within the Commission, the condition of intent was agreed to be implicit in the term 'governed by international law'. And, as Dr. Münch admits, virtually no writer has claimed otherwise. It was perhaps for the reason that this element was in no real danger of being overlooked in practice that the Commission was not unduly exercised by the controversy.

Ascertainment of intention is, however, no easy matter.¹ The terms used in agreements are often treacherously unclear and there may have in fact been no common intention. The parties may not have considered the question of the force of an instrument and cloaked it in ambiguous language. The decision-maker must, in such cases, reach the most reasonable decision he can on the facts. Of course, if it is clear that the parties have not agreed that the agreement was binding it cannot be considered binding.

The language used must be the fundamental gauge to the parties' intention. Words of obligation, 'will', 'must' and so on normally suggest a serious undertaking. But some of the problems that might arise have already been seen in recording the views of Lauterpacht I. When one looks at some of the broad provisions in that class of agreements so little respected by Professor Fawcett, cultural, educational, scientific and technical co-operation agreements, one sees the difficulties. The following provisions may illustrate the point:

(a) Argentina–Nicaragua Cultural Agreement,² 1964; the Parties agree:

- ... to accord each other all possible facilities for the mutual dissemination of culture;
- ... to encourage exchanges of teachers, technicians ...;
- ... to consider how recognition can be made for each other's degrees and diplomas;
- ... to encourage co-operation between institutions;
- ... to appoint two Commissions to ensure execution of the agreement.

(b) France–Portugal Cultural, Scientific and Technical Co-operation Agreement,³ 1970; the Parties:

- ... shall organize exchanges of teachers;
- ... undertake to seek ways and means of granting recognition for each other's qualifications;
- ... should facilitate contacts between specialist French and Portuguese institutes and bodies;
- ... shall establish a mixed commission to determine the procedures for applying the agreement;
- ... shall allow, on conditions laid down in their domestic regulation, duty-free import of educational, scientific, cultural and technical materials.

¹ The problem involved in ascertaining the parties' common intention was nicely put by Judge Dillard in the *I.C.A.O. case, I.C.J. Reports*, 1972, p. 107: '... Multilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow. On the other hand there are other articles which are generally recognised as imposing definite legal obligations. The point at which the former merge into the latter constitutes one of the most delicate and difficult problems of law and especially so in the international arena where generally accepted criteria for determining the meaning of language in the light of aroused expectations are more difficult to ascertain and apply than in domestic jurisdictions.'

See *American Journal of International Law*, 70 (1976), p. 242, for an account of the measures taken at Helsinki in order to make it clear on the face of the instrument that the principles adopted in the 1973 Declaration on East–West Relations were not intended to be binding.

² *United Nations Treaty Series*, vol. 671, p. 172.

³ *Ibid.*, vol. 793, p. 233.

(c) Netherlands–Hungary Cultural Agreement,¹ 1968; the Parties, being desirous of promoting co-operation, agree:

- ... to further exchanges of professional teachers;
- ... to provide scholarships;
- ... to provide co-operation between institutions;
- ... to encourage exchange visits;
- ... to establish and further develop lectureships or courses on the language and culture of the other;
- ... to have translations made of works of the literature of each other;
- ... to establish a mixed commission.

(d) Denmark–Hungary Agreement on Economic, Industrial and Technical Co-operation,² 1969; the Parties shall:

- ... endeavour to promote co-operation on projects of common interest;
- ... endeavour to promote exchange of specialists (Sending State to pay all expenses incidental to travel);
- ... establish a mixed commission.

(e) United States–Spain Friendship and Co-operation Agreement,³ 1970; the Parties agree:

- ... to continue close co-operation;
- ... to expand exchanges in cultural fields;
- ... the U.S.A. agrees, subject to U.S. legislation to assist Spain in research and training.

(It contains also a number of very specific provisions on defence co-operation.)

Some other, less representative, examples are given in the footnotes.⁴

Many social conventions, while containing specific and detailed terms of obligation, contain also rather elastic provisions, such as the Australia–Yugoslavia Convention⁵ of 1970, Article 7 of which reads: ‘The Australian Government, in the light of the first-hand investigation by an Australian Tripartite Mission on training of skilled workers in Yugoslavia, shall continue to use its good offices to advance recognition and acceptance of Yugoslav qualifications in Australia.’

To what extent Australia will continue to use its good offices is obviously dependent upon the conclusions and recommendations of the Tripartite Mission. But some obligation exists: to continue using its good offices to the extent called for by the Mission’s report.

Undertakings such as some of those described above, couched in terms of ‘encourage’, ‘promote’, ‘subject to domestic regulations’, often supplemented by an ‘as far as possible’ are, of course, deliberately wide and vague. The agreements

¹ Ibid., vol. 724, p. 253.

² Ibid., vol. 733, p. 149.

³ Ibid., vol. 756, p. 141.

⁴ For example, the U.S.A.–Republic of China Agreement for Scientific and Scholarly Co-operation 1969 (ibid., vol. 714, p. 139) contains the general obligation ‘to increase contacts’ and provides that each Government shall bear its own costs and designate an executive agency to supervise the ‘contacts’. The Israel–Nicaragua Technical Co-operation Agreement 1966 (ibid., vol. 770, p. 77) records agreement to establish, at the request of either party, technical co-operation projects, each one to be dealt with later in a special agreement. This must be considered as *pactum de contrahendo*.

⁵ Ibid., vol. 742, p. 300.

containing such clauses are creatures of policy; they often establish frameworks for relations between the States parties. A Cultural Co-operation Convention can be as much an indication of an attempt by the States parties either to prove that a state of 'good relations' exists or, even more, to attempt to improve relations,¹ as a joint communiqué of two Foreign Ministers. This, however, is not to say that such instruments are to be considered deprived of legal force: to be dismissed as of peripheral and ephemeral importance, Foreign Office toys.

States may use any form of agreement they wish and make it clear that they are speaking in terms of aspirations² and hopes rather than binding undertakings. But if they do not and instead use the form of agreement together with the language of obligation, they must be assumed to have intended something more. Obligations to 'encourage' and 'promote', broad as they might be, are not meaningless. It is possible to ascertain the meaning of such a term and on the facts as they are presented in any dispute conclude whether or not the undertaking has been carried out. Moreover, in many of these cases the provision for the establishment of mixed commissions to supervise implementation of the agreement must suggest that the parties are not operating wholly on a plane of aspiration. Questions such as whether or not the subject-matter involved justifies employment of the treaty vehicle must be left for the parties alone to decide.

It might, of course, be rather difficult for State A to find evidence that State B has not 'promoted' teacher exchanges, but this is not a reflection going to obligation; rather, it goes to evidence of breach. It can also be argued that it is more than difficult to envisage circumstances under which a State would take legal action against another alleging breach of such an undertaking. Only on very rare occasions could the compensation demanded amount to much more than a declaration of unlawful breach. But again, these are reflections of evidence and remedy rather than intention and obligation.

It is here, too, that Fawcett's suggested tests of intention to create legal relations suffer from practical flaws. Agreements such as those cited above occasionally contain a compulsory dispute settlement clause, but does this change the nature of the obligation? No—it would be just as curious to contemplate the dispute settlement clause's ever being used. This is the major reason why such clauses do not often appear in this class of agreement.

It is perhaps because questions of remedy and evidence are too often confused with those of intention and obligation that odd notions of what is, and what is not, a treaty arise. The difficult problems of enforcement are best left in that realm and not pushed ahead and injected into the very notion of

¹ It is interesting to note how often the first agreements between States which have recently established relations between each other are of this type. When many Western States decided in the 'sixties or 'seventies to improve the state of their relations with the Soviet Union or the People's Republic of China, a cultural agreement was often a vehicle for the fulfilment of the policy. Holder and Brennan, *The International Legal System* (1972), p. 711, make the valid point that one of the major uses of the treaty is as a policy instrument.

² None of what is written is intended to suggest that non-binding agreements do not fulfil a purpose. They are immensely important as policy instruments.

treaty.¹ Why should a transaction not be treated at its highest level of legal potential?

In connection with the painstaking task of ascertaining the intention of the parties at the time of concluding an agreement, a number of tests or guides have suggested themselves to writers. Most of these, however, ultimately return to the language employed. The principal suggestion for a test is whether or not the obligation is susceptible of judicial interpretation and application.² This, it is sometimes said, is something more than a test of intention. Some of the separate opinions in the *Norwegian Loans* and *Interhandel* cases³ suggested, as has been noted earlier, that if the obligation undertaken is incapable of third-party interpretation, if it is so wide that there is no discernible core of obligation or if the sphere of its application is left solely in the discretion of one party without there arising a duty to act in good faith, these circumstances would not only negative an alleged intention to be making a serious undertaking, but also could not give rise to an act in the law. It has likewise earlier been suggested that, in the international system, it is more in keeping with the nature of things to base such a conclusion on intention rather than to link it with a general principle of law of municipal systems based on compulsory enforcement procedures.

Moreover, one finds attractive the rather liberal approach adopted by Judge Read in the *Norwegian Loans* case and advocated in Lauterpacht I of, wherever possible, subjecting formulations framed in discretionary terms to the overriding duty under international law to act in good faith, thus salvaging some element of discernible obligation out of a pottage of subjectivity.

Dr. Münch, in his conclusions in this field,⁴ suggests a test which at least leads us to something a little less flighty than the language used. He makes the observation that the degree of commitment necessary to make an agreement binding must be lacking if one party is promising a result the achievement of which is not in the power of the parties to the treaty alone (similar to the Lauterpacht 'capability' test). Thus in the Potsdam Declaration the signatories pledge themselves to support the Soviet claim to North-East Prussia which, says Dr. Münch, on the basis that the formal agreement of Germany would be necessary for implementation of the plan, suggests that there is no intention to reach a binding agreement. Whatever the merits of this general thesis, his example is not convincing. The other parties are not, one would have thought, agreeing to cede German territory to the Soviet Union; they are agreeing to support a claim by the Soviet Union to such territory.

¹ The same situation can be found in all legal systems. The existence of a right even when linked with the availability of a remedy does not mean that the right will be enforced. In day-to-day transactions of an ordinary kind, it will seldom be worth our while to seek to enforce our strict legal rights.

² O'Connell, *International Law* (1971), vol. 1, pp. 195 et seq. Reuter seems to take a very liberal and not unambiguous view of this requirement. He criticizes, at p. 44 of his *Introduction au droit de traités*, the view that precise obligations must be intended to result before an instrument can be considered a treaty or international agreement, saying that international responsibility is engaged 'même si les règles ne posent qu'une obligation mal définie'.

³ Above, pp. 129-31.

⁴ Loc. cit. (above, p. 136 n. 5). Münch also employs a basic test of precision in drafting.

The general principle would, however, seem to be something of an aid in seeking the intention of the parties. If they appear to be agreeing on matters over which they do not themselves have exclusive control, it is likely that they are expressing a hope or desire or stating an intention rather than binding themselves to a set course of action.¹ But care must be taken that the parties are not intending to promise each other to attempt to take certain action, to do everything in their power. In many cases, it is submitted, this is exactly what the parties will have in mind.

Another view put forward by Dr. Münch is that agreements concerning future action consisting of unspecified measures, the expediency of which would normally be determined later on, would usually not be intended to be binding. He cites as examples those clauses in the Potsdam Declaration dealing with future occupation policy in Germany. While it could be agreed that certain contingency plans between allies concerning war policy may not be intended to bind, in the case of Potsdam the parties were concerned with settling their relations with a defeated Germany, an altogether different matter.

Dr. Münch's final suggested category of 'non-binding' agreements comprises what he calls 'gentlemen's agreements' which, however, he fails to define. He here gives as his examples the 1946 United Nations agreement on election to the Security Council and the 1966 Luxembourg compromise on voting in the Council of the European Communities. The exact status of such instruments,² however, remains unclear: they are at times and by some commentators considered binding, at other times and by other commentators not. Moreover, their provisions must be reconciled with those of the instruments they supplement or even amend. Their terms are nowhere carefully enunciated and, while it does seem in practice that violations are tolerated (the most outraged reaction being a demand for re-negotiation), this does not necessarily mean that they are not binding. Such agreements as these within international institutions are a trifle bizarre and it might be inaccurate to speak of them as gentleman's agreements³

¹ O'Connell, op. cit. (above, p. 140 n. 2), p. 202, is another supporter of this view.

² Certain 'agreements' by the members of the United Nations concerning seat allocation between the various regional groups in organs of limited and rotating membership have in fact been the subject of controversy. L. C. Green, in *Current Legal Problems*, 13 (1960), p. 255, discusses the agreement on seating in the Security Council. The different views of States (ranging from India's: a binding agreement which cannot be violated, to that of the U.S.A.: a temporary agreement which has lapsed) suggest that the status of the agreement has never been settled. For many years it could not be operated on the East European seat.

The 1971 and 1976 elections to the International Law Commission showed similar confusion about a 'gentleman's agreement' of 1956 concerning allocation of seats. The Latin Americans, while calling the agreement 'binding' and seeking its revision, spoke of many violations. See *American Journal of International Law*, 66 (1972), p. 356. These and later elections in the I.L.C. are dealt with most helpfully by E. Lauterpacht in *Internationales Recht und Wirtschaftsordnung; Festschrift für Mann* (1977). Lauterpacht's conclusion is that these 'gentleman's agreements' are not considered binding practices. He is hard put to find the criterion which separates a binding practice from a non-binding practice but assumes it must be intention.

³ Münch criticizes the view of Bittner that, while States might not be bound by a 'gentleman's agreement', Governments or the officials who signed it might be. There is simply no authority for the view that Governments or officials are responsible, but not States, in these circumstances. The closest illustration of this we have found in recent practice is an Exchange of Letters between the Netherlands and Indonesia (*United Nations Treaty Series*, vol. 799, p. 14) where one

as that term is usually employed to describe arrangements that are not intended to be legally binding, where the parties have set out intentionally not to bind themselves. This was probably not the case in the Luxembourg compromise.

Can any other worthwhile guidelines be grasped as further aids towards ascertaining intention? Form and procedure used by the parties will, it is submitted, often be of value in such an enquiry. The more usual forms of binding agreement—treaty, convention, agreement and exchange of notes—must (particularly the first two) raise a presumption that binding force is intended.¹ Other forms such as protocol and arrangement are probably ambiguous, while joint statements, communiqués and so forth might give rise to a counter-presumption. ‘Declaration’ is a particularly ambiguous title: there is a whole class of instruments often entitled ‘declaration’ where obligations are directed outwards to a third party or indeed the world in general and are not intended to flow between the parties. These would seem to lack the essential characteristic of creation of rights *inter se* necessary to the ‘agreement’ form of obligation.

But one must be wary of reading too little into the more exotic appellations. Considerations of domestic constitutional provisions often lead States away from the terms ‘treaty’ or ‘convention’.

The preamble, too, may give some clue to the purpose to be fulfilled by the instrument. Whilst most often it will be drafted in hortatory style, it might on occasion give expression to the results desired by the parties.²

Kaplan and Katzenbach³ suggest also the ‘relationship of the parties, the seriousness of detrimental action in reliance and the subject matter’ as tests. These are vague considerations and perhaps unhelpful in the abstract, but they lead us towards the goal we are in fact seeking: positive evidence of a serious undertaking intended to be kept.⁴ In the case of subject-matter, for example, it is difficult to conceive of the parties to an agreement of cession not intending to bind themselves. Similarly in view of the reliance that would be placed upon it,

functionary wrote to his counterpart: ‘I would greatly appreciate it if you could exercise your good offices to ensure that this request is favourably considered by the . . . authorities entrusted with implementation’

¹ Kaplan and Katzenbach, *Political Foundation of International Law* (1964), pp. 236 et seq. See also the American *Restatement*, commentary on § 115, and Hungdah Chiu, *The Capacity of International Organizations to conclude Treaties* (1966), p. 209.

Lauterpacht II, p. 125, reports that ‘although the parties may have intended a treaty to mean little, no assumption is possible that they intended it to mean nothing and that the instrument concluded in the form of a treaty—with the concomitant solemnity, formality, publicity and constitutional and other safeguards—is not a treaty’. This formulation may be too narrow. Any of the forms in use by custom to record binding international agreements must raise some presumption, a view in accordance with the actual article drafted by Lauterpacht.

² Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. 1 (1962), §§ 130 et seq.

³ Op. cit. (above, n. 1).

⁴ Corbin on *Contracts* (1963), § 15, makes a similar point in a municipal context: ‘. . . expression of intention is not always a promise to act in that way. There must be an invitation to reliance.’ This is close to Judge Nervo’s remark in the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 95, that: ‘. . . the fact that the Federal Republic informed the two Kingdoms that it was preparing to ratify the Convention cannot be considered as a legal and binding promise to do so.’

an agreement on wheat-aid in time of drought could only with cynicism be considered as intended to raise no more than a hope on the part of the recipient State.

For subsidiary indications, a joint statement of the views of the parties at the time of conclusion of the agreement would be of probative value. For example, in the case of the 1943 Inter-Allied Declaration of Despoliation there was a Note attached setting out the views of the signatories on what they hoped to achieve by the Declaration. While not as unambiguous as it might have been, it is of some assistance in such an enquiry.¹ The precise value of later views of the parties is hard to gauge. An expression of joint views of all the parties must carry weight and, as the parties to a treaty can always agree to suspend or terminate it, they should by the same token be able to alter by agreement its binding character.

The views of one party at the time of conclusion of the instrument will be of some assistance, subject to all other considerations being equal, but one party's statements made at a later stage should be disregarded, unless no more cogent evidence were available, as self-serving.² One must be a little wary when whole instruments are dismissed out of hand by one party as statements of intention, notwithstanding the inclusion of articles containing words of clear and specific obligation.

Registration under Article 102 of the U.N. Charter by one party alone may be considered in much the same way as a statement of bindingness by one party shortly after conclusion of the instrument. But there are here other factors at play and it was as a means of providing some light in the darkness of borderline cases that Sir Hersch Lauterpacht in his Second Report inserted a provision raising a presumption of legal obligation in favour of registered instruments. Sir Gerald Fitzmaurice did not share the view that any such presumption should arise.³ Nor, apparently, did Sir Humphrey Waldock.

The principal argument against reading an implication of this nature into registration flows from the nature of the act: in nearly all cases it is unilateral. But Hungdah Chiu provided the rebuttal to this argument: it is equally open to the other party to protest in cases where, in its view, the instrument is not a treaty or international agreement.⁴

¹ Misc. No. 1 (1943) (Cmnd. 6418). See *International and Comparative Law Quarterly*, 5 (1956), p. 84, and *American Journal of International Law*, 51 (1957), p. 802.

² The same criticism could be made of U.K. and U.S.A. statements concerning the effect of the Allied War agreements, Yalta, Potsdam, etc. In the *Aegean Sea Continental Shelf* case, the Greek interpretation of the May 1975 communiqué was communicated in a Note Verbale to the Turkish Government. The Turkish reply simply expressed disagreement with the Greek interpretation (Greek memorial on jurisdiction).

³ Above. Despite this, the dissenting opinion of Judges Spender and Fitzmaurice (and Judge van Wyk) in the *South West Africa* cases (*First Phase*), *I.C.J. Reports*, 1962, p. 494, suggest that non-registration raises an inference that the parties do not consider the instrument is a treaty or agreement.

⁴ Hungdah Chiu, *op. cit.* (above, p. 142 n. 1), p. 707. We saw no such 'protests' published in the *United Nations Treaty Series* during the period 1964-71. An illustration of the type of dispute possible in this field occurred over an agreement on title to certain old Dutch shipwrecks off the Australian coast. In return for the Dutch title, Australia promised the Netherlands a share in the treasure recovered. Australia all along treated the instrument as an international agreement and wished it to be registered with the U.N. For the Netherlands it was a contract,

The argument that the terms employed in Article 102 are more elastic and flexible than the term 'international agreement' in general law can be met with the reply that, however wide may be the terms in Article 102, they must include the more restricted class of binding treaties and international agreements with which we are concerned.

Article 102, of course, does not make registration compulsory but in so far as the most direct access to relief will often be provided under the auspices of one or other of the organs of the United Nations, it is in the interests of the parties to register. It scarcely need be added that the International Court of Justice is an organ of the U.N.: registration is essential for a judicial remedy.

One is, then, led to the conclusion that it is likely that binding agreements will be registered under Article 102. But so too will other instruments. In such a case, the presumption may perhaps best be treated from the other direction: an unregistered agreement will be presumed, *prima facie*, not to be binding.¹

Publication in a State's own treaty series would be of much the same force as a unilateral statement.²

The American Law Institute Restatement on Foreign Relations Law³ treats insertion of a compulsory judicial-arbitral dispute settlement clause as an indication of an intention to bind. It does indeed suggest that the parties are serious. It may even raise a presumption but it is doubtful whether it can be considered as conclusive proof of bindingness. The parties might simply wish it to be open to a tribunal to interpret a 'non-binding' agreement.

These guidelines then, together, assist one in reaching a conclusion on the force of clauses in international instruments. Individually, however, the most any of them can do is raise a presumption.

* * *

Having thus reached some conclusions on the elements of a treaty and the nature of intention to bind and be bound, the second task is to distinguish from the class of treaty those agreements which most worried the International Law Commission—those which the parties intend to submit to a particular municipal legal system, or at least some system other than international law.⁴

No problems arise, of course, when the parties to a transaction make it clear presumably under Dutch law, whether or not registered. The agreement was not in fact registered.

¹ Mann is critical of Lauterpacht's presumption in his article 'Reflections on a Commercial Law of Nations', this *Year Book*, 33 (1957), p. 20, at pp. 30-1. He could probably agree with the reverse formulation adopted in our text. It is, to some extent, the view of Judges Spender and Fitzmaurice (above, p. 143 n. 3).

² See Myers, loc. cit. (above, p. 117 n. 1), p. 584, on U.S.A. practice. ³ Above, p. 117 n. 3.

⁴ The Harvard Research Draft, loc. cit. (above, p. 117 n. 3), Commentary on Article 1, reported that some early writers claimed that such agreements were not entered into by States in their capacity as States and should not be considered as treaties (e.g. Liszt). Others claimed that they were all treaties and all subject to international law. Anzilotti and Gidel maintained that the parties were free to choose which law would govern the agreement. The Harvard suggestion is that if it is recorded in a formal instrument (the only type of agreement in the scope of the Harvard Draft) under which the obligation is apparently one of international law, then international law will govern it.

on the face of the instrument that they are agreeing under international law. But this is rarely the case. More often the agreement is silent on the point. Most 'loan agreements' and 'guarantee agreements' contain no express choice of law clause.¹ The vast network of United States' commodities agreements² is silent on the point, though they are registered under Article 102 of the Charter.

One can do no more than return to the guidelines and presumptions, or those that are relevant, listed earlier, for ascertaining the intention of the parties. The subject-matter of the agreement will, of course, be of immense importance.³ It is scarcely likely that a cultural co-operation convention, for example, will be intended to be concluded under a private law system. Then, as a general premiss, it must be assumed, in the absence of any clear indication to the contrary, that if the parties choose the form of international agreement (treaty, convention and so on, and even agreement, rather than contract) they are agreeing under international law.⁴

It will, of course, be in the field of loans, sales and other commercial transactions that this question will most often arise. Certainly, as Dr. Mann has so lucidly shown,⁵ international law is quite capable of governing such a transaction, the device of the implied term not being a monopoly of private law. But so too are municipal systems able to deal with commercial transactions between international entities.

The fact that many of these commercial transactions in the form of international agreements contain dispute settlement clauses referring disputes to international tribunals, and that most are registered under Article 102,⁶ must suggest that they are being submitted to international law even if it be the case that international tribunals are able to apply municipal law.⁷

Occasionally an inter-State agreement will expressly declare that it is to be governed by a municipal legal system. But such provisions are not often to be seen in the *United Nations Treaty Series*. And is it not possible to contemplate an agreement constituting a 'treaty' in international law and a 'contract' under a

¹ See any of the I.B.R.D. or I.D.A. agreements listed in a recent volume of the *United Nations Treaty Series*.

² See, for example, U.S.A.-Tunisia, *United Nations Treaty Series*, vol. 692, p. 155. For an agreement on loan of vessels see that between U.S.A.-Japan, *ibid.*, vol. 707, p. 207.

³ An example from Swiss practice suggests itself: Guggenheim's *Répertoire Suisse*, vol. I, pp. 1-2, where an agreement between two railway administrations was considered to be a contract under private law because it did not concern matters of direct interest to States. This consideration is also present in the reasoning of the Court in the *Anglo-Iranian Oil Co.* case.

⁴ The I.A.E.A. occasionally calls its supply agreements 'contracts'. But they are no different from those which it calls 'agreements'. They speak of entry into force and so on. There is nothing to suggest that they are not concluded under international law.

⁵ 'Reflections on a Commercial Law of Nations', this *Year Book*, 33 (1957), p. 20. It must, however, be borne in mind that if the assistance of a municipal system of law is required to carry out a transaction, for example, if property is to be secured, the transaction will have to be subject to that system. The most an international tribunal could do would be to direct the parties to carry out the obligation: to take the necessary steps in municipal law. See Sommers, Broches and Delaume, *Law and Contemporary Problems*, 21 (1956), p. 463 at p. 479.

⁶ For example, loan agreements with the I.B.R.D. and I.D.A.

⁷ The I.C.J. can apply municipal law according to the decision in the *Serbian Loans* case (*P.C.I.J.*, Series A, No. 20 (1929)), assuming that to be correctly decided. A decision by an international tribunal may, of course, be of no effect in municipal law.

private law system at the same time? If, in these cases, there is no express choice of law clause such a situation should cause no offence so long as both systems refuse to allow a litigant a double remedy.¹ Under the 'general principles of law' source, the *non bis in idem* rule is said to be incorporated into international law.² There might be certain differences of treatment of validity, termination and so on, but the same problems arise in conflict law and can be solved at the dispute settlement stage. If there is a formal defect in the instrument in either jurisdiction, it should not prohibit a party from seeking the aid of the other jurisdiction.

There is one complicating factor. In certain agreements, while there is no choice of law clause, there is either substantial reference to the terminology of a particular legal system or incorporation of a partial choice of law clause. Examples of the former are often to be found. Some agreements for the sale of agricultural commodities, for example, refer to 'bills of lading'.³ Examples of the latter are less easy to come upon, but a series of United States' investment guarantee agreements⁴ provide that 'the Agreement shall be interpreted in accordance with the rules of Public International Law'. But they also contain a clause that 'the Guaranteeing Government shall accept no greater rights than those of the transferring investor under the laws of the Host Government'. They contain an international dispute settlement clause covering disputes which, in the opinion of either of the parties, involve a question of international law. Jurisdiction of the United States' Courts is excluded. In such cases (unless the clause cannot be read in such a fashion)⁵ it is bound to be most felicitous to avoid labyrinthine conflicts problems and treat the whole agreement as subject to international law with an incorporation of some private law provisions.

Reference to private law terminology can be interpreted in the same way as any other technical expression. And references to the substantive rules of

¹ See, for example, a similar rule in the English Law of Conflicts: Graveson, *Conflict of Laws* (7th edn., 1974), pp. 597 et seq.

² Bin Cheng, *General Principles of Law* (1953), Chapter 14 on the *non bis in idem* rule. The defendant State will often be able to claim sovereign immunity. Mann, in 'The Law Governing State Contracts', this *Year Book*, 21 (1944), p. 22, mentions some English cases which adopted the principle that transactions between States governed by other laws than those administered by municipal courts are not cognisable in English Courts. The tendency there is to link the doctrine of sovereign immunity with choice of law. We would prefer to consider choice of law purely in terms of intention and not according to whether or not the State is acting *in imperii* or *in commercio*.

³ For example, that between U.S.A.-Tunisia, *United Nations Treaty Series*, vol. 692, p. 155.

⁴ For example, that between U.S.A.-Zambia, *ibid.*, vol. 616, p. 267. Some Danish loan agreements used to contain a clause reading: 'Except where this Agreement expressly provides otherwise all rights and obligations will be governed by Danish law.' The agreements contained international dispute settlement clauses, e.g. Denmark-Morocco, *ibid.*, vol. 657, p. 195.

⁵ The body of law referred to in the American investment guarantee clauses can be incorporated into the terms of the agreement. Even the Danish formula, which could be read as a choice of law clause, can equally be read as simply incorporating substantive Danish law provisions on loans into the agreement, while allowing it to remain an agreement subject to international law. In other words, while international law will regulate validity, termination and so on, the parties have saved the international judge from having to devise implied terms by giving him a Danish set. It matters nothing that the Danish courts might read it as a Danish contract.

another system can without pain be incorporated into the terms¹ of obligation (with which international law is not generally, excluding rare outbursts of *jus cogens*, concerned). In this connection Dr. Mann, in his article 'The Proper Law of Contracts concluded by International Persons',² argues that while the distinction between 'incorporation' and 'choice of law' is a real one, the distinction between the formula 'to be construed in accordance with English law' and the clause 'shall be governed by English law' is merely verbal, citing the Privy Council in the *Vita Foods* case.³ The point is important in this context because a number of inter-State agreements contain such a term as 'the provisions of this Agreement shall be interpreted in accordance with the laws of the State of New York'.⁴ Dr. Mann finds the *Vita Foods* view unanswerable and would call the type of clause cited above an express choice of law. Others have taken the view that such a clause refers only to the provisions of New York law concerning interpretation.⁵ Surely the direction of such a clause must depend on the intention of the parties and the context of the clause. To begin with, the *Vita Foods* analysis can be countered: the terms 'mortgage' or 'bill of lading' can be construed or interpreted according to the English law of interpretation without subjecting the transaction in question to the full force of the English law of commercial security or shipping. It is this that one assumes to be in the minds of parties when they use the term 'interpretation'. If they wish expressly to choose a legal system, why do they not employ the term 'govern'?⁶

¹ The debate in the I.L.C. at the 638th and 655th meetings (*Yearbook of the International Law Commission*, 1962, vol. 1) is again relevant. Mr Amado (at p. 169), it will be recalled, raised this point in connection with deletion of the intention test from the draft articles on use of terms. Mr. Amado seemed to have in mind just this problem: an international law treaty incorporating municipal law terms. No helpful views were expressed but Professor Ago (at p. 172) suggested that it was a question of whether or not the parties had intended to contract under the municipal system.

The Commission in 1959 had been 'clear that it ought to confine the notion of an international "agreement" for the purposes of the law of treaties to one the whole formation and execution of which (as well as the obligation to execute) is governed by international law' (Waldock I, p. 32). It is not clear how far this goes: where terminology is derived from a municipal system or where portions of a municipal system have been incorporated into the agreement, the 'formation and execution' is still governed by international law: the parties are merely using a form of shorthand in drafting the terms of the agreement. Lauterpacht I, p. 100 (Note 4), treated all such instruments as being governed by international law in the last resort: if the parties stipulate that an instrument shall be governed by private law it is international law which gives force to this direction.

² This *Year Book*, 35 (1959), p. 34 at pp. 38 et seq. See his municipal law references on 'incorporation' and 'choice of law'.

³ [1939] A.C. 277. Lord Wright put it this way at p. 298: '... the conclusion of a contract by English law involves the application to its terms of the relevant English Statutes, whatever they may be, and the rules and implications of the English common law for its construction, including the rules of conflict of laws. In this sense the construing of the contract has the effect that the contract is to be governed by English law.'

⁴ For example, the early I.B.R.D. loan agreements. See Sommers, Broches and Delaume, loc. cit. (above, p. 145 n. 5), and also Broches, *Recueil des cours*, 98 (1959-III), pp. 341 and 356; Delaume, *Legal Aspects of International Lending* (1967), p. 84; Sereni, *Recueil des cours*, 96 (1959-I), p. 206. Mann, 'The Proper Law of Contracts', this *Year Book*, 35 (1959), p. 34, takes the view that such a clause involves an express choice of law. Delaume takes into account the relevant regulations of the I.B.R.D.

⁵ Sommers, Broches and Delaume, loc. cit. (above, p. 145 n. 5).

⁶ For a different view on some aspects of this, Delaume, op. cit. (above, n. 4), p. 78.

It was a reflection of these complicating factors which led the Special Rapporteur (Mr. Reuter) of the International Law Commission's study on Treaties concluded between International Organizations and between States and International Organizations¹ to adopt, in his 'scope' section, the following terminology:

... treaty ... means an international agreement ... governed principally by general² international law ... ,

although his Commentary³ suggests that the addition of neither 'principally' nor 'general' was considered essential. From his study of such agreements, he concludes that there are in practice no real problems: there is always a general legal regime which applies principally and it is this regime which determines what sort of an instrument it is.

This seems a somewhat confusing explanation. Mr. Reuter appears to take characterization of the instrument out of the hands of the parties and into some sort of *prima facie* relevant legal system. The test suggested earlier seems more attractive: if the parties can be said to intend to agree to create obligations in international law, it will be a treaty, even if it incorporates aspects of municipal law, and even, it may be added, if some of the incorporated provisions concern validity, since most rules of the law of treaties can be varied by the parties to the treaty in question.⁴

A nice practical illustration of these problems has recently come to hand.⁵ It concerns an Agreement between the U.S.A. and the Federal Republic of Germany. The Agreement, which was registered under Article 102,⁶ provided that paintings from East Germany found in the U.S.A. after the Second World War would be transferred to the Federal Republic to be held on the same trust as a certain East German Museum had held them before the war. In an action in the Federal German courts a woman, who was able to show that the museum had held one of the paintings on trust for her, succeeded in obtaining title to the painting. The Court reasoned that the term 'trust' must be interpreted in the American sense of the term and found that the museum had in fact held the painting on the plaintiff's behalf in such a sense.

¹ *Yearbook of the International Law Commission*, 1974, vol. 2, pp. 135 et seq.

² 'General' was added to cover cases where the international organization concerned had evolved a complete legal system of its own. One would have thought that in such a case a term would be added to the agreement, incorporating by reference such a code or set of rules. Indeed the I.B.R.D. does something similar now, incorporating conditions into its agreements. The word 'general' was deleted after debate (*Yearbook of the International Law Commission*, 1974, vol. 1, pp. 124 et seq.).

³ *Loc. cit.* (above, n. 1), pp. 139 et seq. Mr. Ushakov (at p. 135) could not conceive of an agreement being anything less than completely subject to international law or, alternatively, completely within a municipal system. Mr. Yasseen (at p. 146) thought that the distinction need not be spelt out: the tenets of interpretation would solve most problems. Mr. Sette Câmara (at p. 150) agreed: any problems of choice of law or 'double choice' could be settled by choice of dispute settlement machinery or by interpretation.

⁴ See, for example, the remarks of the Swedish representative at the First Session of the Conference (A/CONF. 39/11, p. 45).

⁵ See Mann, 'Another Agreement between States under National Law', *American Journal of International Law*, 68 (1974), p. 490.

⁶ *United Nations Treaty Series*, vol. 681, p. 57.

Dr. Mann suggests that the Court applied American law to the agreement without even considering the relevance of public international law or German law. He criticizes this, claiming there was no reason to apply American law and, in any case, which American law was it: federal law or the law of a particular State?

An alternative explanation is that the Court was not intending to transform the agreement into a private law contract but was merely interpreting the terms employed.¹ Dr. Mann rejects this approach because the plaintiff, as a private person, should have no right in the courts to base a claim on an international treaty. In this case, however, the plaintiff could be said to be relying on her prior title. The F.R.G., as defendant, might be said to be relying on the treaty but the plaintiff is not necessarily so doing. Moreover, if one assumes, as does Dr. Mann, that the Court is treating the instrument as a contract under 'American law', one is left in the same corner; the plaintiff was not a party to that contract. Also, the Court 'rectified' the instrument by amending a date patently inserted in error. The Court did this without any investigation of 'American law' on that subject.²

* * *

It is the intention of this Article to clarify some of the ideas behind use of the terms 'treaty' and 'international agreement' and come to some conclusions in the nature of a working hypothesis. It seems at the end to relate to nothing less esoteric than the parties' intent. But some helpful guidelines have, it is hoped, been discerned.

¹ Since the term was 'trust', a term of Anglo-American law, there was more reason to suppose American rather than German law would be appropriate. Mann is, of course, correct to criticize the use of the term 'American law'.

² If we treat the instrument as an international agreement, this seems to be the first reported instance of rectification.

THE DRAFT UNITED NATIONS CONVENTION ON TERRITORIAL ASYLUM*

By P. WEIS†

I. INTRODUCTION

THE provision relating to asylum in the draft United Nations Declaration of Human Rights as adopted by the Human Rights Commission of the United Nations in 1948 read:

Article 14—1. Everyone has the right to seek and to be granted asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The wording of the first paragraph was, however, on the proposal of Mrs. Corbet (United Kingdom), amended in the Third Committee of the General Assembly of the United Nations to read: 'Everyone has the right to seek and to enjoy asylum from persecution', in order to make it clear that the individual does not have a right to be granted asylum. It was adopted in this form by the General Assembly and became Article 14 of the Universal Declaration of Human Rights. This formulation has been described as 'artificial to the point of flippancy' by the late Sir Hersch Lauterpacht.¹

The Commission of Human Rights decided as early as its second session, in December 1947, 'to examine at an early opportunity the question of the inclusion of the right of asylum from persecution in the International Bill of Human Rights or in a special Convention for the purpose'.² Efforts to incorporate an article on asylum in the International Covenant on Civil and Political Rights failed, however.³ This failure was owing not only to the opposition of those representatives who considered that the right of asylum was not a fundamental right of the individual, but also to lack of agreement between representatives of Western and of Socialist States as to the personal scope, as to the definition of the persons to whom asylum should be granted, and as to who should be excluded therefrom.

In this situation, the representative of France in the Commission, Professor René Cassin, at the Commission's thirteenth session in 1957 submitted a Draft Declaration on the Right of Asylum. It took ten years of discussion in the

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¹ In 'The Universal Declaration of Human Rights', this *Year Book*, 25 (1948), p. 374.

² Report of the Second Session, U.N. Doc. E/600, para. 48.

³ Cf. P. Weis, 'The United Nations Declaration on Territorial Asylum', *Canadian Yearbook of International Law* (1969), pp. 92-149 at pp. 96-7.

Commission, and in the Third and Sixth Committees of the General Assembly, before this Declaration was adopted by the General Assembly by unanimous vote under the name 'Declaration on Territorial Asylum'.¹ Great pains were taken to make it clear that asylum was not a right of the individual but the right of States to grant asylum, first, by deleting the word 'right' from the title of the Declaration, and also by declaring in Article 1 (1):

Asylum granted by a State *in the exercise of its sovereignty* (emphasis added) to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

It is, in fact, more exact to speak of the competence rather than of the right of the State to grant asylum; it is a competence that flows from territorial supremacy.²

Efforts to establish a Convention on Territorial Asylum started soon after the adoption of the Declaration. The late René Cassin said the Declaration was 'a beginning, not an end'. The International Law Commission of the United Nations had, in 1949, included the right of asylum in the list of topics selected for codification, but had not assigned any priority to it.

II. THE 'BELLAGIO DRAFT'

The European Office of the Carnegie Endowment for International Peace at Geneva consulted in 1970 a number of lawyers, among them members of the International Law Commission, on the opportuneness of dealing with the subject. As the answers were favourable, the Endowment, in consultation with the United Nations High Commissioner for Refugees, convened a 'Colloquium on Territorial Asylum and the Protection of Refugees in International Law' at the Villa Serbelloni, Bellagio, Italy, in April 1971, to which the following were invited:

Professor Milan Bartoš, Yugoslavia, member of the International Law Commission of the United Nations, Ambassador Mohammed Bedjaoui, Algeria, member of the International Law Commission, Ambassador E. K. Dadzie, Ghana, Professor I. Foighel, Denmark, Professor Ludmilla Galenskaya, Soviet Union, Professor M. Ganji, Iran, Mr. Ousmane Goundiam, Senegal, Procureur Général, Ambassador Edvard Hambro, Norway, Norwegian Representative to the United Nations and President of the General Assembly of the United Nations, Sir Samuel Hoare, Great Britain, Mr. Pierre Juvigny, France, member of the Human Rights Commission of the United Nations, Professor Shigeru Oda, Japan, Professor Covey T. Oliver, United States, Dr. A. H. Robertson, Director of the Human Rights Department of the Council of Europe, Ambassador José María Ruda, Argentina, Representative of Argentina to the United Nations, Dr. Oskar Schürch, Switzerland, Director of the Federal Police Department, Professor Arnold J. P. Tammes, Netherlands, member of the

¹ General Assembly Resolution 2312 (XXII) of 14 December 1967.

² Cf. Kimminich, *Asylrecht* (1968), p. 77; Lieber, *Die neuere Entwicklung des Asylrechts im Völkerrecht und Staatsrecht* (1978), p. 18.

International Law Commission, Ambassador Endre Ustor, Hungary, member of the International Law Commission, Professor Stefan Verosta, Austria, and the present writer.

Professor Galenskaya, Ambassador Hambro and Ambassador Ruda were prevented from taking part.

The representatives of the Carnegie Endowment were Mr. John Gormaghtigh, European Director, who chaired the meetings, Mr. Ralph Zacklin, head of the International Law Section of the Endowment in New York, and Dr. A. M. Kamanda of Sierra Leone who acted as Rapporteur. Mr. Ivor C. Jackson took part on behalf of the Office of the United Nations High Commissioner for Refugees. Dr. Kamanda had, on behalf of the Endowment, prepared a voluminous report on 'Territorial Asylum and the Protection of Refugees in International Law'.

As a result of a general exchange of views at the Colloquium, it was agreed to prepare a set of articles, without prejudice to the question of what form the instrument should take.¹ The Colloquium appointed a Special Drafting Committee, consisting of Sir Samuel Hoare as Chairman, Professor Bartoš, M. Juvigny, Mr. Dadzie, Mr. Jackson, Professor Ganji and Dr. Kamanda; Mr. Zacklin took part on behalf of the Carnegie Endowment. At the end of the discussions it became clear that the draft instrument should be in mandatory form, in the form of a draft convention.

The Colloquium provisionally adopted three articles on (1) the grant of asylum; (2) *non-refoulement*, i.e. the principle that a person should not be returned to a country where he might be persecuted; and (3) international solidarity. The elaboration of the remaining provisions was, owing to lack of time, left to a Working Group, which met at Geneva in January 1972. It consisted of Professor Bartoš, Mr. Bedjaoui, Mr. Dadzie, Professor Atle Grahl-Madsen, Norway, Professor at the Norwegian School of Economics and Business Administration at Bergen, Sir Samuel Hoare, Professor Covey Oliver, Dr. Schürch, Professor Tammes, Mr. Francisco Urrutia, Colombia, Consultant for Latin America to the United Nations High Commissioner for Refugees, Mr. Ustor and the present writer. Mr. Juvigny and Professor Verosta, who had also been invited, were prevented by illness from participating. The Working Group had before itself the Report on the Bellagio Colloquium prepared by Dr. Kamanda, tentative drafts of the outstanding articles prepared by Mr. Jackson and the present writer and submitted by the Endowment, and a comparison of the adopted and suggested articles with the Draft Convention on Territorial Asylum prepared by the Asylum Committee of the International Law Association.² The Working Group appointed a Drafting Committee consisting of Professor Grahl-Madsen, Professor Covey Oliver, Mr. Ustor, the present writer and Professor Siotis of the Carnegie Endowment. Sir Samuel Hoare was

¹ Cf. Weis, 'The Draft Convention on Territorial Asylum of the Carnegie Endowment for International Peace' in *A.W.R. Bulletin*, 11 (1973), pp. 94-101.

² Cf. Report of the New York Conference of the International Law Association, 1972, pp. 207-11; the Conference slightly amended the text prepared by the Asylum Committee.

asked to draft a Preamble. The Working Group added to the articles adopted at Bellagio articles on: Non-extradition, Provisional Stay pending Consideration of Request, Voluntary Repatriation, Co-operation with the United Nations, Peaceful Character of Asylum, Right of Qualification, Regime of Asylees, and Good Faith. This draft has become known as the 'Bellagio Draft', although it was only partly drawn up at Bellagio, the greater part being prepared at Geneva.

The High Commissioner for Refugees submitted the Draft to the Executive Committee of his Programme and, through the Economic and Social Council, to the General Assembly. The Third Committee of the Assembly in 1972 requested the High Commissioner to consult with Governments and to report on the matter to the Assembly at its next session. At the 1973 session, the Chairman of the Third Committee asked the High Commissioner to continue his consultations with Governments.

Ninety Governments made known their views; thirty of them included comments on the Bellagio Draft. Seventy-five Governments declared themselves in favour of strengthening the law relating to territorial asylum by the adoption of a convention within the framework of the United Nations.¹ The United Kingdom Government considered that much of the purpose of the proposed new instrument would be achieved if the 1951 Convention relating to the Status of Refugees were more widely and fully implemented. It stated, however, that it did not wish its attitude to be considered as wholly negative, and that it would not oppose the convening of a Conference of Plenipotentiaries should there be substantial support for one.²

The General Assembly, at its twenty-ninth session in 1974, decided to establish a Group of Experts on the Draft Convention, composed of representatives of not more than twenty-seven States, designated by the President of the General Assembly after consultation with the different regional groups, on the basis of equitable geographical distribution, to be convened not later than May 1975 and for a maximum of ten working days, to review the text of the Draft Convention. The costs of convening the Group of Experts were to be met from voluntary funds at the disposal of the High Commissioner.³ This constituted a very unusual method of financing, as such costs are normally defrayed from the general budget of the United Nations.

III. THE DRAFT OF THE GROUP OF EXPERTS

The Group of Experts met at Geneva from 28 April to 9 May 1975. The following States had been appointed to be members: Argentina, Australia, Austria, Belgium, Brazil, Costa Rica, France, India, Indonesia, Iran, Iraq, Italy, Kenya, Mali, Mexico, Nigeria, Sri Lanka, Sudan, Sweden, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay,

¹ U.N. Doc. A/9012/Add. 1 and A/AC.96/508 and Add. 1.

² Doc. A/AC.96/508/Add. 1, para. 5.

³ General Assembly Resolution 2372 (XXIX) of 10 December 1974.

Yugoslavia and Zaïre. The present writer took part as expert for the United Kingdom.

It was agreed that the Group would endeavour to reach its conclusions by consensus whenever possible. For those provisions where a consensus could not be reached, it was agreed that the different views would be reflected in a report which would provide some indication of the support among the participants for a particular formulation or standpoint.¹

The text of the articles rendered here is that reproduced for each article in the Report, in the light of the discussion; it is identical with a consolidated text of the articles prepared by the Secretariat and appended to the Report at the request of a majority of experts over the objection of the Soviet and Ukrainian experts.²

Article 1, *Grant of Asylum*, which differed only slightly from the Bellagio text, read:

Each Contracting State, acting in the exercise of its sovereign rights, shall use its best endeavours in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention.

This wording was considered as a compromise between the unfettered right of States to grant or to refuse asylum and the humanitarian duty to grant asylum.³

Article 2, *Application*, which deals with the personal scope of the draft Convention, read:

1. A person shall be eligible for the benefits of this Convention if he, owing to a well-founded fear of:

- (a) Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, or
- (b) Prosecution or punishment for acts directly related to the persecution as set forth in (a)

is unable or unwilling to return to the country of his nationality, or, if he has no nationality, the country of his former habitual residence.

2. The provisions of paragraph 1 of this article shall not apply to any person with respect to whom there are serious reasons for considering that he has committed:

- (a) A crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes; or
- (b) A serious common offence under the laws and regulations of the Contracting State granting asylum;
- (c) Acts contrary to the purposes and principles of the United Nations.

Paragraph 1 (a) closely followed the wording of the definition of 'refugee' in Article 1A (2) of the Convention relating to the Status of Refugees of 28 July 1951.⁴ Paragraph (b) constituted an effort to define the political offender without

¹ *Report of the Group of Experts* (hereinafter *Report*), Annex to U.N. Doc. A/10177, para. 8.

² See *Report*, pp. 38-41.

³ Cf. *Report*, paras. 30-50.

⁴ *United Nations Treaty Series*, vol. 189, p. 137. Cf. *Report*, paras. 51-62.

designating him as such, as the concept is different in the law of the Western and Socialist States.

As regards Article 3, *Non-refoulement*, it was generally recognized that this was the most important provision of the Draft Convention. In the Bellagio Draft, the principle of *non-refoulement* had been expressed in absolute terms, both as regards persons within the territory of the State and those seeking asylum at the frontier. In the Group of Experts, certain members felt that, regarding persons at the frontier, the principle should not be expressed in absolute terms, as a mandatory obligation, but that the wording 'A Contracting State shall use its best endeavours' should be used. It was this view that prevailed and found expression in the text of the Article:

1. No person entitled to the benefits of this Convention who is in the territory of a Contracting State shall be subjected by such Contracting State to measures such as return or expulsion which would compel him to return to a territory where his life or freedom would be threatened. Moreover, a Contracting State shall use its best endeavours to ensure that no person is rejected at its frontiers if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment for any of the reasons stated in article 2.

2. The benefit of the present provision, however, may not be claimed by a person whom there are reasons for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community in that country.

3. Where a Contracting State decides that an exception should be made on the basis of the preceding paragraph, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity of going to another State.

The second paragraph followed the wording of the corresponding provision in the 1951 Convention relating to the Status of Refugees, Article 33 paragraph 2. The third paragraph followed Article 3 paragraph 3 of the Declaration on Territorial Asylum.¹

The Bellagio Draft contained a provision on *Non-extradition* to the effect that no person shall be extradited to a State to the territory of which according to the principle of *non-refoulement* he may not be returned. In the Group of Experts it was generally recognized that such a provision might give rise to difficulties from the standpoint of existing extradition treaties and, in particular, treaties of a bilateral character. At the second reading it was decided by a majority to delete the article.²

The provision concerning *provisional stay pending consideration of request* (Article 4) was accepted with a wording differing slightly from that of the Bellagio Draft:

A person seeking asylum at the frontier or in the territory of a Contracting State shall be admitted provisionally to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a competent authority.³

¹ Cf. *Report*, paras. 63-75.

² *Ibid.*, paras. 78-81.

³ *Ibid.*, paras. 82-96.

The article in the Bellagio Draft on *international solidarity* provided for a mandatory duty 'to take appropriate measures' in order to assist at its request a Contracting State experiencing difficulties from the influx of refugees. This wording was amended by the majority in the sense that 'each Contracting State shall . . . take such measures *as it deems appropriate* (emphasis added) . . . to share equitably the burden' of the State granting asylum. Article 5 read:

Whenever a Contracting State experiences difficulties in the case of a sudden or mass influx, or for other compelling reasons, in granting, or continuing to grant, the benefits of this Convention, each Contracting State shall, at the request of that State, through the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, or by any other means considered suitable, take such measures as it deems appropriate, in conjunction with other States or individually, to share equitably the burden of that State.¹

As regards *voluntary repatriation*, the Group of Experts chose a different wording from the Bellagio text, which had provided that Contracting States shall facilitate voluntary repatriation, a provision which was considered too far-reaching by certain experts. Article 6 therefore read:

If an asylee should, of his own free will, express his desire to return to the territory of the State of his nationality or former habitual residence, neither the Contracting State granting asylum nor any other Contracting State shall place any obstacles in the way of his repatriation.²

An article on *co-operation with the United Nations* (Article 7) was accepted with some changes as compared with the Bellagio Draft:

The Contracting States shall co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may be created for the purpose, as regards the application of the provisions of this Convention. The Contracting States shall permit persons seeking asylum, if they so desire, to make contact with the Office of the United Nations High Commissioner for Refugees.³

Regarding the *peaceful character of asylum*, some experts took the view that this provision should figure in the Preamble. The majority agreed, however, that the second sentence of the Bellagio text, which provided that asylum should be respected by other States, was clearly of a normative character.

At the second reading it was decided to incorporate the whole clause into the operative part as Article 8:

The grant of territorial asylum in accordance with article 1, or the application of other articles of this Convention, is a peaceful and humanitarian act. It shall not be regarded as an act unfriendly to any other State and shall be respected by all States.⁴

The provision on the *right of qualification*, i.e. that this right appertains to the State whose territory the person concerned has entered or seeks to enter,⁵ was,

¹ Ibid., paras. 97-101.

² Ibid., paras. 102-10.

³ Ibid., paras. 111-16.

⁴ Ibid., paras. 117-22.

⁵ This follows also *a contrario* from the dictum of the International Court of Justice in the *Asylum* case that the State granting diplomatic asylum does not have a right of unilateral qualification

in the Bellagio Draft, limited to the grounds for granting asylum or for applying the provisions concerning *non-refoulement* and non-extradition. In the discussion some experts considered that this was too limited and that the question of qualification could arise also in respect of other articles of the Convention. This view is reflected in the text accepted for Article 9:

Qualification of the grounds for granting asylum or applying the provisions of this Convention appertains to the Contracting State whose territory the person concerned has entered or seeks to enter and seeks asylum.¹

If the right of qualification were to be applied to *all* the provisions of the Convention it would, it is submitted, make its application entirely subjective. In the Report² it is stated that 'It was, of course, obvious that Article 9 would only be applicable when a question of qualification arose', but the wording chosen is quite general.

The United Kingdom stated in its comments on the Draft of the Group of Experts that this article 'as presently drafted could effectively deprive the Convention of any force and might indeed be seen as a step backwards in the international protection of refugees'.³

The article of the Bellagio Draft on the *regime of asylees* provided that 'States granting asylum shall not permit asylees to engage in activities contrary to the purposes and principles of the United Nations' and that 'without prejudice to the provisions of regional conventions, a State incurs international responsibility for the action of asylees to the same extent that it would be responsible for the actions of any other person living in its territory'. The latter provision followed a corresponding clause in the Resolution on Asylum adopted by the Institute of International Law at its Bath session in 1950.⁴

As regards the prohibition of activities contrary to the purposes and principles of the United Nations, certain experts considered that it would give rise to constitutional difficulties, as the legislation of their countries contained far-reaching provisions concerning freedom of speech and freedom of the press. The second paragraph met with objections on the ground that the question of State responsibility was under consideration by the International Law Commission and that rules of State responsibility had not yet been established, that it was not clear and that it had no place in the Convention. In the end, at the second reading, there was general agreement that the article should be deleted.⁵

The Bellagio Draft contained an article on *good faith* reading:

All determinations and decisions called for in the application of this Convention shall be made in good faith and with due regard to ascertainable facts.

It was designed to take account of the view expressed that in the past asylum had sometimes been granted to persons not deserving it, such as *purely* economic migrants.

as diplomatic asylum is a limitation of the sovereignty of the territorial State (*I.C.J. Reports*, 1950, p. 266 at pp. 274-5).

¹ Cf. *Report*, paras. 123-6.

² Para. 125.

³ Doc. A/CONF. 78/5, p. 8.

⁴ *Annuaire*, I (1950), p. 167, Art. 2 (2).

⁵ Cf. *Report*, paras. 127-31.

In the Group of Experts, the article was deleted by general agreement; it was pointed out that the principle of good faith was a recognized principle of international law, which had found expression in Article 26 of the Vienna Convention on the Law of Treaties.¹

The Group of Experts adopted an additional draft article reading:

Nothing in this Convention shall prevent a Contracting State from granting asylum to persons referred to in article 2, paragraph 1, under conditions more favourable than those laid down in this Convention or from granting asylum to persons other than those covered by this Convention, it being understood that, in the latter case, the provisions of this Convention shall not apply.²

IV. THE CONFERENCE OF PLENIPOTENTIARIES³

1. *The opening stages*

The General Assembly requested the Secretary-General, in consultation with the United Nations High Commissioner for Refugees, to convene a conference of plenipotentiaries on territorial asylum from 10 January to 4 February 1977 to consider and adopt a Convention on Territorial Asylum. It decided that the costs of holding the Conference should be met by voluntary contributions and authorized the High Commissioner to seek such funds. The Secretary-General was asked to refer the report of the Group of Experts to member States for any observations and comments they might wish to make before the Conference.⁴

The Conference met at Geneva on 10 January 1977. The representatives of ninety-two States participated; in addition, the Government of Thailand was represented by an observer. The present writer took part in the Conference as a member of the United Kingdom delegation, which was led by Mr. F. L. T. Graham-Harrison, C.B., formerly Assistant Under-Secretary of the Home Office.

From the outset, differences of view existed on various points of the rules of procedure of the Conference: on the number of representatives forming the Drafting Committee and on its composition; whether attendance of the Drafting Committee and of other sub-Committees should be limited to its members, or whether they should be 'open-ended', i.e. whether representatives not members of the Committee concerned could take part in its deliberations; and on the role of non-governmental organizations in the Conference.

As to the number of members of the Drafting Committee, it was decided after much discussion that the number should be thirty-one.⁵ It was also decided that all delegations could attend the meetings of the Drafting Committee as well as of sub-committees and working groups, unless otherwise decided.⁶ On the participation of the non-governmental organizations, the Executive Committee of the

¹ Ibid., paras. 132, 133.

² Ibid., paras. 134-41.

³ Cf. F. Leduc, 'L'asile territorial et la Conférence des Nations Unies de Genève Janvier 1977', *Annuaire français du droit international*, 1977, pp. 221-67; M. Mitić, 'The United Nations Conference on Territorial Asylum', *Review of International Affairs*, 28 (1977), no. 647, pp. 14-25.

⁴ General Assembly Resolution 3456 (XXX) of 9 December 1975.

⁵ Rules of Procedure, Doc. A/CONF. 78/9, Rule 47.

⁶ Ibid., Rule 46.

High Commissioner's Programme had recommended that representatives of non-governmental organizations concerned with the problems of refugees should be invited to attend the Conference as observers. The interested organizations had formed a Working Group and had, prior to the Conference, prepared an interesting draft for a convention; some of the points made in the draft were taken up by delegations in the Committee of the Whole and actually found their way into the draft articles adopted by the Committee. After considerable discussion the Conference decided that representatives designated by non-governmental organizations concerned with problems relating to the protection of refugees and having consultative status with the Economic and Social Council of the United Nations could be permitted to attend the public meetings of the Plenary of the Conference and of the Committee of the Whole. They were allowed to make written but not oral statements.¹ This role of the non-governmental organizations differed from that granted to those having consultative status at other conferences dealing with humanitarian law, such as the Conferences on the Status of Refugees² and on the Status of Stateless Persons,³ in which they participated as observers and could make oral statements.

While the Conference elected Mr. Osman (Somalia) as President of the Conference by consensus, no consensus was reached on the chairmanship of the Committee of the Whole. Mr. do Nascimento e Silva (Brazil) was elected Chairman by 46 votes against Mr. Nettel (Austria), who obtained 36 votes.

These various controversial points required much discussion within the regional groups, and informal discussions between the regional groups. The meetings of the Conference therefore frequently had to be postponed. It took until 13 January before the Committee of the Whole could meet.

2. *Proceedings in the Committee of the Whole*

The Committee of the Whole elected Mr. Nettel (Austria) Vice-Chairman and Mrs. Thakora (India) Rapporteur. It accepted the consolidated text annexed to the Report of the Group of Experts⁴ as the basis of discussion.

Article I, Grant of Asylum. Most representatives agreed that it was necessary to reconcile the discretionary right of the State to grant asylum with the humanitarian interest that asylum should be granted to the persecuted. Three tendencies became apparent: a tendency to go further than the consolidated text and to establish a duty to grant asylum (and, conversely, a subjective right to be granted asylum, as was proposed by the Federal Republic of Germany).⁵ The establishment of a duty to grant asylum was supported by Austria, Colombia, Costa Rica, France and Italy. Many representatives favoured the wording in the consolidated text, 'Each Contracting State shall use its best endeavours to grant asylum . . .', which in their view struck a right balance between the conflicting interests of the

¹ Conference Records, Doc. A/CONF. 78/SR. 7, para. 8.

² Rules of Procedure, Doc. A/CONF. 2/3/Rev. 1, Rule 27 (3).

³ Economic and Social Council Resolution 288 (X)B Part VII, 'Consultations with Conferences called by the Council', para. 33.

⁴ Cf. *Report*, pp. 38-41.

⁵ Doc. A/CONF. 78/7, Art. 1.

State and of the individual. Some representatives, particularly those of Argentina, Cuba, Egypt, Iran, Jordan, Pakistan, Roumania and the Syrian Arab Republic, considered that this text went too far, and supported a wording that laid more emphasis on the sovereign right of the State to grant or not to grant asylum, such as 'Each Contracting State may grant asylum . . .'. Jordan proposed replacing the words 'shall use its best endeavours' by the words 'shall endeavour'.¹ This amendment was, by a surprise vote, adopted by 31 votes to 29, with 18 abstentions. The text proposed by the Group of Experts as amended by Jordan was adopted by 56 votes to 2, with 17 abstentions. After the vote, several representatives declared that they had thought they had voted for the consolidated text containing the words 'shall use its best endeavours'. A motion for reconsideration was, however, rejected.

The Bellagio Draft of the article had contained a paragraph reading:

Asylum shall not be refused solely on the ground that it could be sought from another State.

A majority of the Group of Experts had decided that the paragraph should be deleted. In the Committee of the Whole, several amendments on this subject were introduced. They were designed to deal with the problem of which country should be considered as the country of asylum, and which country should consider an asylum request. In practice, refugees are not infrequently told to 'move on' because they could seek or could have sought asylum from another State. This has created the problem of the so-called 'refugees in orbit' who, although eligible for asylum, are not granted asylum in any country.

In the Committee of the Whole, the other amendments on this point were withdrawn in favour of a Danish amendment,² which was similar to a text contained in the draft convention prepared by the non-governmental organizations. It was adopted by 25 votes to 23, with 35 abstentions.

Article 1, as reviewed by the Drafting Committee, reads:

Each Contracting State, acting in the exercise of its sovereignty, shall endeavour in a humanitarian spirit to grant asylum in its territory to any persons eligible for the benefits of this Convention.

Additional paragraph

Asylum should not be refused by a Contracting State solely on the ground that it could be sought from another State. However, where it appears that a person requesting asylum from a Contracting State already has a connexion or close links with another State, the Contracting State may, if it appears fair and reasonable, require him first to request asylum from that State.

The final placing of the additional paragraph, i.e. whether it should form paragraph 2 of Article 1 or a separate article, was to be decided at a later stage.³

Article 2, Application. The draft text of this article, dealing with the personal scope of the Convention, falls in the form in which it was prepared by the Group

¹ Ibid., 78/C.1/L.16 (Committee document L.16).

² Committee document L.15.

³ Doc. A/CONF. 78/DR/RI.

of Experts into two parts: paragraph 1, which defines the persons who should be eligible for the benefits of the Convention (the inclusion clauses), and paragraph 2, defining the persons who should not be so eligible (the exclusion clauses).

The provision gave rise to prolonged discussion and to a great many proposals for amendments. They can be broken down into: (a) amendments seeking to amend the introductory phrase of the paragraph so as to emphasize even more strongly the sovereign right of the State to grant or to refuse asylum; (b) amendments seeking to add to the grounds of persecution; and (c) amendments relating to paragraph 2 seeking to widen the exclusion clauses. Some proposed the addition of a paragraph 3 and 3^{bis} for this purpose.

After a debate that occupied six meetings, the Committee adopted a joint oral amendment for the beginning of paragraph 1, by Argentina, Indonesia, Malaysia, Pakistan and the Philippines, reading:

Each Contracting State may grant the benefits of the Convention to a person seeking asylum if he, being faced with the definite possibility of persecution . . .

The amendment was adopted by 38 votes to 34, with 15 abstentions. It will be noted that by this amendment the words 'if he, owing to well-founded fear of . . .' were replaced by the words 'if he, being faced with a definite possibility of . . .'. The former words were, as has been mentioned,¹ taken from the 1951 Convention relating to the Status of Refugees, which, together with the 1967 Protocol relating to the Status of Refugees,² had by 31 January 1980 been ratified by 80 States. Most of them apply the definition of refugee in the Convention and Protocol also for the granting of asylum. It implies both an objective ('well-founded') and a subjective ('fear of persecution') criterion. The amendment adopted is more restrictive, providing for an objective test only, and would depart from the present practice of many States. Its application would, moreover, imply a pejorative judgment by the authorities of the State granting asylum on the general conditions in the country of origin of the person seeking asylum. This is not necessarily the case in the application of the criterion of 'well-founded fear of persecution' which enables these authorities to rely on the statements of the person seeking asylum.

In sub-paragraph (a), the Committee adopted by 45 votes to 21, with 15 abstentions, an amendment by Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Morocco, Saudi Arabia, Somalia, Sudan, the Syrian Arab Republic, Tunisia, the United Arab Emirates and Yemen³ to add to the grounds of persecution after '*apartheid*' the words 'foreign occupation, alien domination and all forms of racism'. It also adopted an Australian amendment, by 40 votes to 24, with 15 abstentions, to insert the word 'kinship' after 'nationality' as a ground of persecution.⁴

It rejected by a roll-call vote, by 35 votes to 33, with 19 abstentions, a Soviet amendment⁵ to insert after the words 'struggle against' the words 'a policy of aggression, war propaganda, nazism and neo-nazism, fascism, genocide, racism'.

¹ Above, p. 155.

² *United Nations Treaty Series*, vol. 606, p. 267.

³ Committee document L.29/Rev. 1.

⁴ Committee document L.10.

⁵ Committee document L.23.

It adopted, by 75 votes to 2, with 5 abstentions, an amendment by Nigeria¹ to insert the words 'domicile or' before 'habitual residence' at the end of the paragraph.

In the introductory passage of paragraph 2 (the exclusion clauses), the Committee adopted by 44 votes to 22, with 15 abstentions, an amendment by Australia² to replace the words 'has committed' by 'is still liable to prosecution or punishment for', a text that constitutes a liberalization from the angle of the individual.

The Group of Socialist countries proposed that exclusion on the ground of commission of a criminal offence should be determined by the law of the country of origin, a proposal that runs counter to the concept of asylum if one considers that under the law of most of these countries illegal departure constitutes a criminal offence. The Committee adopted, however, by 26 votes to 23, with 31 abstentions, an Australian amendment for sub-paragraph (b)³ reading:

(b) an offence which would be a serious criminal offence if committed *in the Contracting State from which asylum is requested* (emphasis added).

It further adopted, by 58 votes to 6, with 16 abstentions, an amendment by Colombia, Japan and Yugoslavia⁴ to insert a new sub-paragraph reading:

(a^{bis}) Other grave crimes as defined in multilateral conventions to which a Contracting State in which he is seeking asylum is a party.

The amendment, which was a compromise between differing views, was designed to exclude terrorist acts such as hijacking, sabotage of aircraft and offences against internationally protected persons.

The Committee adopted on a proposal by Yugoslavia,⁵ by 28 votes to 24, with 28 abstentions, a new sub-paragraph, which reads:

(3) The provisions of paragraph 1 of this article shall also not apply to any person requesting territorial asylum for purely economic reasons.

It also adopted, on a proposal by Indonesia, Malaysia and the Philippines,⁶ by 54 votes to 9, with 19 abstentions, a further sub-paragraph, which reads:

(3^{bis}) The provisions of paragraph 1 of this article shall not apply to any person whom there are serious reasons for regarding as a threat or a danger to the security of the country in which he is seeking asylum.

Article 2 as a whole, as amended, was adopted by 47 votes to 14, with 21 abstentions. (With the exception of Article 1, none of the articles adopted was considered by the Drafting Committee.) It reads:

1. Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of:

- (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, foreign occupation, alien domination and all forms of racism; or

¹ Committee document L.2, Art. 3 and Corr. 1.
orally revised.

³ Committee document L.10.

² Committee document L.10 and Corr. 1 as

⁴ Committee document L.75.

⁵ Committee document L.22.

⁶ Committee document L.12/Rev. 1.

- (b) Prosecution or punishment for reasons directly related to the persecution set forth in (a);

is unable or unwilling to return to the country of his nationality or, if he has no nationality, the country of his former domicile or habitual residence.

2. The provisions of paragraph 1 of this article shall not apply to any person with respect to whom there are serious reasons for considering that he is still liable to prosecution or punishment for:

- (a) A crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes; or
- (a^{bis}) Other grave crimes as defined in multilateral conventions to which a Contracting State in which he is seeking asylum is a party; or
- (b) An offence which would be a serious criminal offence if committed in the Contracting State from which asylum is requested; or
- (c) Acts contrary to the Purposes and Principles of the United Nations.

3. The provisions of paragraph 1 of this article shall also not apply to any person requesting territorial asylum for purely economic reasons.

3^{bis}. The provisions of paragraph 1 of this article shall not apply to any person whom there are serious reasons for regarding as a threat or danger to the security of the country in which he is seeking asylum.

In their explanations of vote, several representatives stated that they had voted against the article or abstained because it constituted, in their view, a retrograde step in comparison with the consolidated text, and that it did not serve the humanitarian purpose that was the object of the Convention.¹ Mr. Graham-Harrison said on behalf of the United Kingdom that he considered that the five-Power amendment to the beginning of paragraph 1 not only restricted the advantages extended to refugees by the Group of Experts but also eliminated the logical link between paragraph 2 and paragraph 1. He had also voted against the amendments that, in paragraph 1 (a), had listed the various forms of political activity that might lead to persecution, because he considered that they were superfluous and might give rise to political controversy. He had therefore been compelled to vote against Article 2 as a whole.²

New Article on the Activities of Asylees. Several delegations proposed an article on the duties of asylees. A similar provision had been incorporated in the Bellagio text, but had been deleted by the Group of Experts. Opposition to the incorporation of such a provision was expressed on the ground that provisions dealing with the status of asylees (i.e. of refugees) had no place in the Convention, that they might discriminate against asylees, and that they might be prejudicial to freedom of opinion, of expression and of the press. On the question of whether the Conference was competent to deal with the matter, it was decided by 43 votes to 8, with 14 abstentions, that the Committee should vote on the proposed new article. The sponsors formed an informal working group and proposed the following wording:

¹ Committee Records, Doc. A/CONF. 78/C. 7/SR. 17, paras. 1-40.

² Ibid., para. 38.

1. A person enjoying the benefits of this Convention shall comply with the laws and regulations of the country granting asylum.

2. [To the extent to which it is possible under their law] Contracting States shall not permit persons enjoying the benefits of this Convention to engage in activities contrary to the purposes and principles of the United Nations set forth in the Charter.

3. If a person enjoying the benefits of this Convention engages in activities [considered by the State granting asylum to be] subversive against his country of origin, domicile or habitual residence, the State granting asylum shall have the right to review and, if necessary, terminate the asylee status of such a person.¹

Ecuador proposed adding at the end of paragraph 3 the words 'without prejudice to the provisions of Article . . . concerning non-refoulement'.² The amendment was adopted by 32 votes to 22, with 20 abstentions, but the paragraph as a whole, as amended, was rejected by 32 votes to 32, with 13 abstentions. The bracketed part of paragraph 2 was adopted by 45 votes to 14, with 13 abstentions. Paragraph 2 as a whole was adopted by 36 votes to 30, with 8 abstentions. Paragraph 1 was adopted by 46 votes to 18, with 18 abstentions.

The Article as adopted reads:

1. A person enjoying the benefits of this Convention shall comply with the laws and regulations of the country granting asylum.

2. To the extent to which it is possible under their law, Contracting States granting asylum shall not permit persons enjoying the benefits of this Convention to engage in activities contrary to the Purposes and Principles of the United Nations as set forth in the Charter.

New Article on Family Reunion. Already during the discussion of Articles 1 and 2 the representative of the Holy See and others had referred to the unity of the family and the desirability of family reunion. Several provisions to this effect were proposed. After internal discussions, the Holy See, Colombia, Switzerland, India and Argentina proposed a consolidated text, reading:

Each Contracting State shall, in the interest of family reunification and for humanitarian reasons, facilitate the admission to its territory of the spouse and the minor or dependent children of any person to whom it has granted the benefits of this Convention.

These members of the family should, save in exceptional circumstances, be given the same benefits under this Convention as that person.³

It will be noted that this proposal dealt only with the admission of family members, not with the right to leave their country of origin.

A motion for the closure of the debate introduced at this point was vehemently opposed by the Soviet Union; the motion was later withdrawn after private consultations. The Soviet Union then tabled the following amendments to the consolidated text:

(1) Replace the words 'in the interest of family reunification' by 'in the exercise of its sovereign rights in each individual case, examine questions of family reunification'.

¹ Committee document WP.3.

² Committee document L.93.

³ Committee document L.80.

(2) After the words 'any person to whom it has granted the benefits of this Convention' insert the words 'in accordance with its laws and regulations'.

(3) Replace the last sentence by the following: 'The provisions of Article 2 paragraph 2 of this Convention¹ shall apply to the members of the family of such persons.'²

It is noteworthy that the Soviet Union, which had opposed the words 'to the extent to which it is possible under their law' in the article on the activities of asylees, *inter alia* on the ground that international law overrides municipal law, here proposed to subject international law to national 'laws and regulations'.

Jordan proposed the following amendment to the consolidated text: replace the first paragraph by the following:

Any Contracting State granting territorial asylum shall in each individual case endeavour, in the exercise of its sovereign rights and in the interest of family reunification and for humanitarian reasons, to admit to its territory the spouse and the minor or dependent children of any person to whom it has granted the benefits of the Convention.³

The Jordanian amendment was voted on first, and was rejected by 38 votes to 38, with 5 abstentions. The first paragraph of the Soviet amendment was rejected by a roll-call vote, by 41 votes to 23, with 20 abstentions. The amendment to the second paragraph was rejected by 43 votes to 19, with 14 abstentions.

The consolidated text as a whole was adopted by 53 votes to 23, with 5 abstentions. The adopted text is therefore that of the joint amendment, which has been quoted.

Article 3, Non-refoulement. All representatives agreed that this was a fundamental, if not the most important, article of the Draft Convention. Considering that Article 1 on the grant of asylum contains only a weak, more moral than legal obligation to grant asylum, the principle of *non-refoulement* is indeed the cornerstone of the Draft Convention. It is, as was stated by the representative of the High Commissioner for Refugees, in some cases tantamount to the right to life.⁴ There is an essential difference between asylum and *non-refoulement*: asylum entails admission, residence and protection; *non-refoulement* is a negative duty, not to compel a person to return to a country of persecution. Its application will, it is true, often lead to the grant of asylum, but this is not necessarily the case. The country concerned may admit the person only temporarily, or expel him to another country in which he does not fear persecution.

The Committee devoted five meetings to the discussion of the article and a great many amendments were introduced. They can broadly be divided into three groups: those basing themselves on the consolidated text of the Group of Experts, those proposing further restrictions, and those wishing to go further than the consolidated text by making absolute the obligation of non-rejection at the frontier or by proposing the deletion of paragraphs 2 and 3. Most of the

¹ The exclusion clauses (author's remark).

³ Committee document L.96 as orally revised.

⁴ Committee Record SR.22, paragraph 26.

² Committee document L.95.

Group of Socialist States, in particular, opposed the principle of non-rejection at the frontier on the ground that most countries had a special frontier regime and/or required a visa for entry into the territory. They insisted, moreover, that the provision on *non-refoulement* should not affect existing extradition treaties.

The duty not to return a person within the territory to a country of persecution was not contested. The principle of *non-refoulement* is, in fact, considered by some authors¹ as a rule of customary international law or as a general principle of law, even as a peremptory norm. The jurisprudence of the European Commission of Human Rights points in the same direction. It has consistently held that expulsion or extradition to a country where human rights are grossly violated constitutes inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights and Fundamental Freedoms.²

The United Kingdom had proposed two amendments: replace in paragraph 2 the words 'in which he is' by 'in which he is seeking asylum'; and in paragraph 3 replace the words 'it shall consider the possibility of granting' by 'it shall grant'.³ The latter amendment was intended to establish, in those exceptional cases in which the principle of *non-refoulement* did not apply, a mandatory duty to give the person an opportunity of going to another country.

From the outset it was decided that the question of non-extradition should be dealt with separately. Several representatives referred to the interrelation between Article 3 and Article 4 on provisional stay pending consideration of request. A motion to defer the voting on Article 3 to a later stage was, however, rejected by a roll-call vote, by 43 votes to 29, with 10 abstentions. All the amendments seeking to restrict paragraph 1 even further, or not to refer to rejection at the frontier at all, were rejected. The Committee adopted, by 39 votes to 25, with 18 abstentions, a joint amendment of Australia, the Federal Republic of Germany, Nigeria and the United States⁴—which was supported by the United Kingdom and most Western delegations—establishing a mandatory obligation of *non-refoulement* at the frontier and within the territory. It rejected the United Kingdom amendment to replace the words 'eligible for the benefits of the Convention' by the words 'seeking asylum' by 37 votes to 31, with 19 abstentions, but adopted an oral sub-amendment by Austria to add after 'this Convention' the words 'in accordance with Article 2 paragraph 1 sub-paragraphs (a) and (b)'. It makes the exclusion clauses of Article 2 inapplicable to Article 3, which was also the intent of the United Kingdom amendment.

As to paragraph 2 of Article 3, the Committee adopted, by 24 votes to 20, with 40 abstentions, a Turkish amendment⁵ designed to provide for an exception from the principle of *non-refoulement* in the case of a mass influx of asylum seekers. It

¹ Cf. Fauchille, *Traité de droit international public* (1922-6), vol. 2, p. 983; Berber, *Lehrbuch des Völkerrechts* (1960), vol. I, pp. 386-7; Goodwin-Gill, *International Law and the Movement of Persons* (1978), p. 140.

² Cf. P. Weis, 'The present state of international law on territorial asylum', *Annuaire Suisse de Droit International*, 31 (1975), pp. 71-96, at p. 90.

³ Committee document L.38.

⁴ Committee document L.102.

⁵ Committee document L.28/Rev. 1.

also adopted, by 34 votes to 31, with 17 abstentions, an amendment by Indonesia, Malaysia and the Philippines¹ to insert in the third line, between 'who' and 'having been convicted', the words 'being still liable to prosecution or punishment for, or', thus widening the exception from the principle of *non-refoulement*.

Paragraph 3 was adopted by 59 votes to 4, with 23 abstentions, after the United Kingdom amendment had been rejected.

Article 3 as a whole was adopted by 59 votes to 4, with 23 abstentions. It reads:

1. No person eligible for the benefits of this Convention in accordance with article 2, paragraph 1, sub-paragraphs (a) and (b), who is at the frontier seeking asylum or in the territory of a Contracting State shall be subjected to measures such as rejection at the frontier, return or expulsion, which would compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution, prosecution or punishment for any of the reasons stated in Article 2.

2. The benefit of this provision, however, may not be claimed by a person whom there are reasons for regarding as a danger to the security of the country in which he is, or who, being still liable to prosecution or punishment for, or having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community in that country or in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State.

3. Where a Contracting State decides that an exception should be made on the basis of the preceding paragraph, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity of going to another State.

3. *Closure of the Conference*

The Conference held one more meeting in Plenary session on 4 February, which was preceded by intensive consultations. They concerned the question whether the Conference should recommend to the General Assembly that the Conference be reconvened. Most Western delegations were not in favour of an early resumption. Agreement was finally reached on the following wording:

The United Nations Conference on Territorial Asylum

Having been unable to carry out its mandate within the allocated time,

1. *Considers* that efforts to draft a convention on territorial asylum should be continued;

2. *Requests* the Secretary-General of the United Nations to transmit the report of this Conference to States;

3. *Recommends* that the General Assembly of the United Nations at its thirty-second session consider the question of convening at an appropriate time a further session of the Conference.

The Third Committee of the General Assembly, at its thirty-second session in 1977 and at its thirty-third session in 1978, took note of the High Commissioner's report that he was consulting Governments on the question of the resumption of the Conference.

¹ Committee document L.60/Rev. 1.

V. CONCLUSIONS

The results of the Conference are disappointing, not only because the Conference was unable to finish its work but also because what has been achieved gives little satisfaction, both from the angle of progressive development of international law and from the humanitarian standpoint. Article 1 on the grant of asylum has been weakened by the replacement of the words 'shall use its best endeavours to grant asylum' by the words 'shall endeavour to grant asylum'. It is believed that the wording of this provision, both in the Bellagio and in the Experts' drafts, struck a reasonable balance between the right of the State to grant asylum flowing from its sovereignty, and the humanitarian interest that asylum be granted. Article 2 on application has been changed out of all recognition in comparison with the Bellagio and Experts' texts. It introduces, as has been mentioned,¹ the new and stricter concept of 'definite possibility of persecution' as criterion for the grant of asylum, while a great number of States currently apply the criterion of 'well-founded fear of persecution', which is taken from the widely ratified Convention relating to the Status of Refugees of 28 July 1951. Article 2 paragraph 1 (a) specifies, moreover, a number of activities as grounds for persecution that would be difficult for a number of States to accept, particularly 'struggle against all forms of racism', in view of the interpretation given by the General Assembly to this term.² To the vague words of the inclusion clause, 'Each State *may* (emphasis added) grant the benefits of this Convention to . . .', a considerable number of exclusion grounds have been added, preceded by the mandatory wording 'The provisions of paragraph 1 of this Article *shall* (emphasis added) not apply to . . .'. The African States have, moreover, given notice that they wish to add a further exclusion ground for 'mercenary activities'.³ Article 3 paragraph 1, on *non-refoulement*, constitutes an improvement as compared with the Experts' text in that it provides for an absolute obligation of *non-refoulement*, both at the frontier and within the territory of the State, but the principle has been hedged in by exceptions in paragraph 2.

A Convention on territorial asylum undoubtedly raises political problems. Most Governments have a particular situation in mind when thinking of asylum. The number of refugees is ever-increasing in this troubled world, and it is therefore understandable that many Governments show reluctance to enter into firm commitments in this field. Those of the Group of Socialist States who expressed views on the general issue were averse to a Convention and these States would probably not ratify it. In this situation it seems unlikely that a Convention on Territorial Asylum that constitutes progress from the legal and humanitarian angles could be concluded in the near future on a universal level within the framework of the United Nations, and still less likely that it would be widely ratified.

It might indeed be easier to arrive at conventions on the subject on a regional level. The Convention on Specific Aspects of the Refugee Problem in Africa of

¹ See above, p. 162.

² General Assembly Resolution 3379 (XXX) of 10 November 1975.

³ Doc. A/CONF. 78/L.5.

the Organization of African Unity¹ contains an Article 2 on asylum that provides *inter alia* that 'Member States of the Organization of African Unity shall use their best endeavours consistent with their respective legislations to receive refugees . . .', and which prohibits *refoulement* both at the frontier and within the territory. It constitutes a nucleus for a Convention on the subject. The African States have been generous in granting asylum to great numbers of refugees, and their attitude at the Conference was, generally, positive.

The attitude of the Western Group, including the Western European States, was equally positive. The Committee of Ministers of the Council of Europe, on 18 November 1977, after the failure of the Geneva Conference, adopted a Declaration on Territorial Asylum in which it is *inter alia* stated:

In fulfilling their humanitarian duties, the Member States of the Council of Europe reaffirm their intention to maintain their liberal attitude with regard to persons seeking asylum on their territory.

and

The Member States of the Council of Europe, parties to the 1951 Convention relating to the Status of Refugees² reaffirm their right to grant asylum to any person who, having well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, also fulfils the other conditions of eligibility for the benefits of that convention, as well as any other person they consider worthy of receiving asylum for humanitarian reasons.

The Declaration constitutes a reaction to the provisions of Article 2 of the Draft Convention on territorial asylum. It is obvious that a treaty of this kind does not restrict the right of States to grant asylum to any person apart from the treaty, but the exclusion clauses of draft Article 2 may give a contrary impression.

On the American continent, asylum is highly developed as a legal institution in the Latin American countries. The latter have concluded a number of treaties, mainly on diplomatic asylum. The Treaty on International Penal Law, signed at Montevideo on 23 January 1889,³ however, also deals with territorial asylum, and a Convention on Territorial Asylum was adopted at Caracas on 28 May 1954.⁴ These treaties deal with asylum from the standpoint of the State only. The American Declaration of the Rights and Duties of Man of 1948 characterizes the idea of asylum as a human right in these terms:

Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and to receive asylum in foreign territory in accordance with the law of each country and with international agreements.⁵

The American Convention on Human Rights, adopted at Costa Rica on 22 November 1969,⁶ proclaims in its Article 22 'the right to seek and to be granted

¹ *International Legal Materials*, 8 (1969), p. 1288; cf. on this Convention, Weis, *Human Rights Journal*, 3 (1970), pp. 449-64.

² All Member States are parties to the Convention.

³ *Pan American Union Treaty Series*, vol. 34, p. 1.

⁵ *American Journal of International Law*, 43 (1949), Supplement, p. 133.

⁶ *International Legal Materials*, 9 (1970), p. 673.

⁴ *Ibid.*, p. 89.

asylum, in accordance with the legislation of the State and international conventions' for political offences and related common crimes, and contains the principle of *non-refoulement*. At the 1977 Conference, several Latin American States took a very liberal attitude while others, mainly those ruled by military dictatorships, took a more restrictive line.

The need for the grant of asylum and for international instruments on asylum is sorry evidence of the fact that human rights are still far from being universally observed. There has, since the Second World War and the adoption of the United Nations Charter, been a rather rapid development of multilateral treaties relating to human rights, but the implementation of these treaties has been much slower. The problem of territorial asylum is closely linked with the whole evolution of international law on human rights.

REVIEWS OF BOOKS

Essays on the Law of International Trade. Hague-Zagreb Colloquium, Zagreb Session, 1974. The Hague: T.M.C. Asser Institute, 1976. 335 pp. Dfl. 25.

In 1974 the T.M.C. Asser Institute for International Law at The Hague (an inter-university institute founded in 1965 by eight Dutch universities offering courses in international law) and the Institute for International Law and International Relations in Zagreb co-sponsored the first of a series of biennial colloquia on the law of international trade. The aim of these comparative legal studies is to facilitate exchange of both legal and practical information between Eastern and Western Europe, comparable to the Polish-(West) German colloquia on international law. For each topic two papers are presented, one by a Western and one by an Eastern scholar. The volume contains these reports, extensive and helpful annexes, and an account of the discussions. It is edited by the T.M.C. Asser Institute (while the Hague-Zagreb *Essays on Product Liability, Road Transport and Application of Foreign Law* are published by Sijthoff, 1978).

All three colloquia held hitherto have concentrated on private international law, commercial law, and the law of procedure. While two of the five topics in 1974 were devoted solely to these themes (jurisdiction to grant injunctions; choice of law clauses in arbitration agreements), the other three also dealt with aspects of public international law. The extensive Dutch report on 'The Position of Legal Persons Acting Abroad' (Netherlands international law relating to corporations) deals with State immunity (including immunity from execution) and the act of State doctrine. C. Voskuil and H. Duintjer Tebbens point out that in Dutch court practice there is a clear tendency towards restricting the number of cases in which State immunity from jurisdiction will be granted (only for *acta jure imperii*, not for *acta jure gestionis*). Some of the remarks by the Yugoslav reporter on '*Jus cogens* and the Law of International Trade' invite criticism: even taking into account the extremely wide concept of *jus cogens* proposed by P. Kalenský, certainly there is no 'general consent' that, for example, self-determination of nations and the 'principle of mutual advantages and benefits' (referring, for example, to unequal international agreements of an economic character) are rules of a peremptory character in international law (pp. 54 et seq.).

The last topic, 'Protection of Foreign Investments', will probably arouse the greatest interest of a public international law scholar. A. Goldstajn delineates the rules on foreign investments in Yugoslavia (which, incidentally, were changed considerably in April 1978), Hungary and Rumania. He concludes that, despite fundamental differences in domestic law, from the viewpoint of international law the level of protection is 'virtually the same' in all three countries. In the corresponding report, D. Kokkini-Iatridou depicts domestic and treaty law of the Western investing and of the developing countries. She shows convergent and divergent tendencies in the subject-matters of transfer of capital and profits, standards of treatment of the foreign investment, conditions of taking over property, settlement of investment disputes and maintenance of status quo. In a chapter on the bilateral treaty law approach she concludes that the Treaties concerning Protection and Encouragement of Investments, introduced in 1959 by the Federal Republic of Germany, at present 'appear to be the most effective instrument of investment protection, in view of the limited possibilities of judicial recourse on the interstate level'.

ROBERT VON LUCIUS

Hague Conference on Private International Law, Actes et documents (13th session, 1976), Vol. I (Miscellaneous matters) (226 pp.); Vol. II (Matrimonial property regimes) (387 pp.); Vol. III (Marriage) (317 pp.); and Vol. IV (Agency) (440 pp.). The Hague: Netherlands Government Printing Office, 1979.

These volumes record the work of the thirteenth session of the Hague Conference on Private International Law. The Conference dealt with three topics: matrimonial property, marriage and agency. The work on the first two topics was completed in 1976 and that on the third in 1978. The result is three draft conventions: the Convention on the Law Applicable to Matrimonial Property Regimes, the Convention on Celebration and Recognition of the Validity of Marriage and the Convention on the Law Applicable to Agency. These draft conventions are dealt with in Volumes II, III and IV respectively.

The two most important problems in the comparative conflict of laws of matrimonial property are, first, whether the governing law should be the law of the parties' domicile or that of their nationality and, secondly, whether it should remain fixed throughout the marriage (the doctrine of immutability) or whether it should change if the domicile or nationality of the parties changes after the marriage (the mutability doctrine). A third, and less important, problem is whether one should look to the personal law of both parties or of only one of them (invariably that of the husband).

The Matrimonial Property Convention adopts an original and effective solution to the first problem: it permits the parties to choose the governing law. But the choice is limited to three options: the law of the State of which either spouse is a national at the time of designation, the law of the State in which either party has his habitual residence at that time, or the law of the first State where both the parties establish a new habitual residence after marriage. If they fail to make a choice before the marriage is celebrated, the governing law is, in principle, that of the country in which they both establish their first habitual residence after the marriage. There are, however, important exceptions to this: for example, if they are both nationals of a contracting State which has made a declaration in terms of the Convention, the law of that State will govern unless the parties both had their habitual residence for the five years prior to the marriage in another State which has not made the declaration or, if a non-contracting State, is not a State whose conflict of law rules require the application of the law of the nationality.

The Convention is scrupulous in giving equal weight to the personal law of each party: there could clearly be no question of giving priority to that of the husband. Thus, if the parties do not establish a habitual residence in the same country, the governing law will (irrespective of the rules mentioned in the previous paragraph) be that of their common nationality. If they also have no common nationality, the governing law will be that of the country with which, taking all circumstances into account, their matrimonial property regime is most closely connected.

The question of mutability was also solved by a compromise. The governing law will change if the parties expressly choose a new law; and their choice is limited to that of the country of habitual residence, or of the nationality, of either of them. The parties have the power to change the governing law by express choice irrespective of whether or not they originally chose the governing law. If they did make such a choice before marriage, the governing law may be changed only by a new choice. If they did not, and if they did not enter into a marriage contract, the governing law will in certain cases change automatically to that of the country in which they have their common habitual residence. The two most important cases in which this will occur are, first, where they are also both nationals of that State and, secondly, where they have both been habitually resident there for ten years. In no case, however, will a change in the governing law adversely affect the rights of third parties.

Though somewhat complicated, this Convention has probably achieved the fairest compromise between the different principles. The adoption of the principle of party autonomy is particularly to be welcomed.

The Marriage Convention is rather unusual in that it does not attempt to lay down a complete choice of law code: it assumes that contracting States will retain their own choice of law rules and it merely imposes an obligation on contracting States to ensure that their choice of law rules comply with certain criteria. The objective, therefore, is not complete uniformity of decision; instead the convention is aimed at making it easier for couples to marry and to increase the international recognition of marriages. The principle of *favor matrimonii* is in fact so strongly embedded in the Convention that it in no case obliges a contracting State *not* to recognize a marriage: it is concerned only with providing when contracting States *shall* be obliged to recognize it.

The two main parts of the Convention are concerned respectively with the celebration and the recognition of marriage. The first part lays down when a contracting State is obliged to permit a couple to marry in its territory. Looked at from another point of view, it may be regarded as laying down rules concerning the validity of marriages celebrated within the territory of the *forum* (*forum* marriages). The second part relates to the validity of marriages celebrated outside the territory of the *forum* (foreign marriages). In both parts, the Convention deals with formal and essential validity. In the case of form, however, the same rule applies in both cases: the *lex loci celebrationis* governs (the recognition provisions do not, however, apply to military marriages, marriages aboard ships and aircraft, proxy marriages, posthumous marriages and informal marriages).

The rule regarding *forum* marriages is that the marriage is valid as to substance (essential validity) either if it complies with the internal law of the place of celebration, provided at least one spouse is either a national of that State or habitually resides there, or if it complies with the applicable law designated by the choice of law rules of the place of celebration. The second rule, of course, merely preserves the *status quo* (where it is favourable to the marriage) but the first introduces a welcome innovation *in favorem matrimonii* which seems to hark back to the much maligned decision of *Sottomayor v. De Barros* (No. 2).¹ Contracting States are, however, entitled to make a reservation excluding the whole of this part of the Convention.

The most important part of the Convention is that concerned with the recognition of marriages celebrated outside the territory of the *forum*. The basic—and, at first sight, rather startling—principle is that *every* foreign marriage must be recognized provided it is valid under the conflict of laws of the State of celebration. (Where the marriage is celebrated in a contracting State, this will of course include the rule mentioned above regarding conformity with the internal law of the place of celebration, unless that State has exercised the option conferred by the Convention of excluding this rule.) The Convention lays down limited exceptions to this principle; these apply only in the following cases:

1. bigamy;
2. where the parties are related, by blood or adoption, in the direct line or as brother and sister;
3. nonage;
4. where one party lacked the mental capacity to consent; and
5. where one party did not freely consent to the marriage.

In deciding whether the marriage is invalid for one of the reasons given above the *forum* will of course apply its own choice of law rules. It is not obliged to hold the marriage invalid even on these grounds; but it is precluded—unless public policy is involved—from refusing its recognition on any other grounds.

From the commercial point of view, the draft Convention on Agency is the most

¹ (1875) 5 P.D. 94.

important of the three. This Convention is of especial interest, since the rapporteur is an English expert, I. G. F. Karsten, whose Explanatory Report is a model of lucidity. It contains a comparative survey of different types of agency as well as a discussion of the basic concepts involved.

The legal issues arising with regard to agency fall into two main categories: the relationship between principal and agent and the rights of the third party against either or both of these. These two questions are treated separately in the Convention, in Chapters II and III respectively.

The basic rule regarding the relationship between principal and agent is the familiar principle of free choice of the governing law. This must, however, be express or such that it may be inferred with reasonable certainty from the terms of the agreement or the circumstances of the case (a provision also found in Article 3 (1) of the E.E.C. Draft Convention on the Law Applicable to Contractual Obligations). In the absence of a choice, the governing law is the law of the country where the agent has his business establishment (or, if he has none, his habitual residence) except that, where the agent will primarily act in the same country as that where the principal has his business establishment (or habitual residence), it will be the law of the latter country.

There is an analogous choice of law rule regarding the rights of the third party. The general rule is that the governing law is that of the country where the agent has his business establishment. However, this will be ousted by the law of the country where the agent acts if any one of the following conditions is fulfilled:

1. The principal has his business establishment (or habitual residence) there and the agent acts in his name;
2. The third party has his business establishment (or habitual residence) there;
3. The agent acts at an exchange or auction; or
4. The agent has no business establishment.

Moreover, if either the agent or principal specifies in writing that the law of some other country will govern, this will override the above rules if it has been expressly accepted by the third party.

The law thus applicable will govern both the relationship between principal and third party (including the existence and extent of the agent's authority and the effects of his exercise of that authority) and that between the agent and the third party (including the case where the agent acts beyond his authority).

It is also provided that effect may be given to the mandatory rules of any country with which 'the situation has a significant connection' if, under the law of the country in question, those rules apply irrespective of the governing law under its choice of law rules.¹ Renvoi is excluded in all cases under the Convention.

The short descriptions which have been given of the three draft conventions will show how valuable and important the work of the Conference has been. It is therefore very fortunate that these volumes of *Actes et documents* have been published. They contain not only the texts of the conventions but also official commentaries, preliminary reports, summaries of the discussions in the conference and much other material. They are in both English and French.

T. C. HARTLEY

The United Nations Operation in the Congo 1960-1964. By GEORGES ABI-SAAB. Oxford: Oxford University Press, 1978. xvi+206 pp. £2.75.

Though much has been written on the Congo operation, it needed time for reflection and access to some recent material—such as the personal accounts by participants like Dayal and Urquhart and the records of the U.N. Advisory Committee—to make this

¹ Cf. Article 7 of the E.E.C. Draft Convention on the Law Applicable to Contractual Obligations.

present book possible. What Professor Abi-Saab has produced is not simply a lucid, and sometimes dramatic, account of the operation but a highly sophisticated analysis of the role of law in an operation of this kind.

It must be apparent that United Nations military intervention in a situation which, whilst properly classed as a 'threat to international peace', is essentially one of civil strife is fraught with difficulties. The concrete applications of the principle of 'non-intervention', or the limitation of O.N.U.C.'s use of force to self-defence and its relation to the right to freedom of movement, raise quite extraordinary difficulties. For example, in relation to Andrew Cordier's decision to close the airfield and radio station in September 1960, thereby favouring Kasavubu in his struggle with Lumumba, Professor Abi-Saab rightly says that strict non-intervention was impossible. Yet, given that Cordier followed the strict process of law, it is impossible to say that his decisions were wrong in the absence of real evidence that his intention was to prejudice Lumumba's position. Similarly, the General Assembly itself, in approving the credentials of Kasavubu, tipped the scale against Lumumba. Nor does the author find it possible to castigate the decisions taken by the United Nations on the degree of protection which they were entitled to afford to Lumumba (and which proved inadequate to save him from murder), for such decisions were taken 'not only on the basis of legal considerations, but also—and perhaps more important—on the basis of political propriety' (p. 91). In fact, the book abounds with examples of situations in which legal and political propriety had to be balanced and reconciled.

Sometimes this balance was not achieved. Perhaps the best example was Operation Morthor, in September 1961, in which O'Brien appeared to justify the military operation as an attempt to end the secession of Katanga by force, a justification which Hammarskjöld could not accept given his insistence on 'non-intervention'. Given time, Hammarskjöld's own capacity for achieving balance and reconciliation between legal and political propriety was remarkable. Professor Abi-Saab shows how in the early stages the Secretary-General developed the theory that his implementation of the resolutions of the Security Council was subject to the 'tacit approval' of the Council unless he was overruled by a new resolution. In the face of mounting Soviet, and even Western, criticism the Secretary-General moved towards the political solution that, without sacrificing the independence of his office, he would be guided by the Advisory Committee of Member States.

Of particular interest is the author's assessment of the constitutional basis for the operation. Given that, by the Security Council's resolution of 21 February 1961, O.N.U.C. was authorized to use force for purposes other than self-defence, he finds it difficult to accept that Article 42 of the Charter was not the correct basis. He suggests that Hammarskjöld's rejection of Article 42, and preference for Article 40, stemmed from his belief that Article 42 was inappropriate in a civil conflict where there was no identified aggressor. The author's preferred view is not entirely convincing, for there is no reason why Article 40 must carry with it the limitation of force to self-defence, and it must be recalled that the International Court opined against Article 42 (a factor in the argument which the author ignores).

Professor Abi-Saab's conclusions are masterly. He sees law not as one factor in decision-making, to be relied on or ignored, but as 'all-pervasive': he says:

... it is the role of law as a parameter of action rather than as a variable which claims priority, in terms of urgency if not necessarily in terms of importance; the more so, the higher the level of controversy surrounding the decision (p. 195).

Thus, Hammarskjöld never operated in a legal vacuum: with or without the guidance of a resolution, he always fell back on the purposes and principles of the Charter as the *legal* basis for his actions, though the element of political judgement remained a separate one within the confines of what was legally permissible. The author concedes that Hammarskjöld's approach to law was somewhat formal and legalistic, in contrast to that

of U Thant, but the author's explanation for this difference is that it was Hammarskjöld who faced the really controversial period of the operations. Indeed, the author not only sees law as having a greater role to play, the greater the political difficulties, but he sees law as having a greater role within international institutions than within the State. His reasons are impressive: they are that in international institutions comprising States of great diversity 'the extreme heterogeneity of the political environment makes legal justification more imperative' (p. 199), and that possibly because of the lack of a single, overriding national interest every decision must find its basis in the constituent treaty which binds them all.

D. W. BOWETT

Les Organismes internationaux spécialisés, contribution à la théorie générale des établissements publics internationaux, Vol. IV. By H. T. ADAM. Paris: Librairie générale de droit et de jurisprudence, 1977. xv+906 pp. Fr. 350.

The Extension of Corporate Personality in International Law. By DAVID ADEDAYO IJALAYE. New York: Oceana Publications Inc.; Leyden: A. W. Sijthoff, 1978. ix+354 pp. Dfl. 68.

These two books represent two different approaches to the study of the law of international organizations. Paradoxically perhaps, it is the French book with its descriptive and casuistic approach which may appeal more to the reader trained in a *casc* law system. The English title, on the other hand, relying more on deduction and doctrinal synthesis and using only relatively few selected case studies, may well be attractive to readers more familiar with continental legal style.

Professor Adam's book is the fourth and most compendious volume of his comprehensive and systematic study of special international organizations. International organizations possessing general competence such as the U.N., its specialized agencies, and regional organizations (e.g. O.A.S., O.A.U., Arab League, etc.) are outside the scope of the work.

The first and second volumes which were published in 1965 dealt with, *inter alia*, the Inter-American Development Bank, the Bank for International Settlements, the Airport Bâle-Mulhouse, the European Investment Bank, the Danube Commission (1948), Eurofima, Eurocontrol, Eurochemic and E.L.D.O. The third volume, published in 1967, added a selection comprising, *inter alia*, the European School, the Permanent Commission of the River Ems, the African Development Bank and Concorde.

The last volume introduces another forty-nine new such institutions, the basic instruments of which had been officially published between 1967 and 1975. Amongst them one finds the most diverse aims and forms such as cultural and scientific organizations (e.g. Intelsat; the European Laboratory for Molecular Biology; the French Gymnasiums in Costa-Rica, Ethiopia, and Argentina; the European University in Florence; the U.N. University in Tokyo; the French-Roumanian Libraries in Bucharest and Paris, etc.); banks (Asian Development Bank, International Investment Bank of Moscow); enterprises offering public transport services (e.g. Road Tunnel Fréjus, the Mont-Blanc tunnel, Air Afrique, the Franco-Spanish 'Pont du Roy' over the Garonne, the abortive Anglo-French Channel Tunnel Project); research projects and inter-State investment plans (e.g. Desalination Plant in Djeddah, International Center for Theoretical Physics); and international administrative bodies (e.g. the Medical Center, Rotterdam, the European Patent Office in Munich). The fixed point of reference is Adam's definition of 'organismes internationaux spécialisés' as 'établissements publics internationaux'.

Relying on the definition in his first volume, the author is aware of but not concerned about the ambiguities surrounding the term, borrowed as it is from French administrative law. In his view the consistent retention of one definition secures a sufficient measure of certainty (p. xi, footnote 1). Like national public enterprises an 'International

Public Establishment' is concerned with the gestation and rendering of public services to individual citizens. Prime characteristics in that definition are their autonomous status based on means and resources of their own and their specialized vocation.

The book is divided into two parts, one systematic, one documentary. The scheme of investigation of these institutions has remained the same: fourteen separate criteria constitute the set of instruments with which the author dissects the constitutive texts of these institutions in the systematic part. These criteria are: the definition, the degree of internationalization, modes of institutionalization, uniformization, attribution of competences, categories of constitutive texts, composition, organization, legislation, jurisdiction, commercial operation, financing, exemptions and dissolutions. Despite such refinement of analysis, however, it is clear that the practice of bilateral, regional or universal integration by means of these institutions has not only increased considerably but continues to create types which cannot be subsumed under one basic model. No reliable principles or rules have as yet crystallized from such diverse practice.

Readability of the systematic part is marred to some extent by frequent references to the earlier volumes as well as by insufficient structure and subdivision in the narrative text. The richly documented second part contains the constituent texts of all 'établissements publics internationaux', unfortunately only in French and without reference to source material in any other language. It is these documents which compel the conclusion that no *a priori* definition of specialized international public enterprises, however broad, can as yet be safely relied on to comprehend the bewildering growth in their number and types.

This monumental work has pioneered a relatively new field and will serve as a source book for scholars who have become aware of the need to pay closer attention to forms of integration which are not on the global or supranational level.

The title of the second study, which is based on the author's doctoral dissertation, can be expected to attract a great number of readers since it promises to deal not only with a highly topical and immensely practical question of contemporary international law but also with the broader, somewhat jurisprudential, question of personality in general.

One cannot dispute the author's underlying assumption that while *tempora mutantur* the law often does change only, if at all, belatedly. He proposes, therefore, 'a thorough re-examination of international concepts and labels . . . to see to what extent international personality has been extended . . .' to embrace 'international institutions and enterprises in international life' (Preface, p. xi). Given this frame of inquiry, it is a little startling to see a lengthy opening chapter on the various indicia for the legal personality of international organizations. It would appear that this chapter was intended to show that international organizations can no longer be said, in principle, to lack international legal personality, a reassuring but hardly necessary endeavour. It would appear somewhat ironical in view of the author's own approving quotation from Joseph L. Kunz that in fact 'most international organizations do not have international personality' (p. 278). However, it was the author's intention to show that States are no longer the only international legal persons (p. 277).

The following chapters deal with intergovernmental (bi- or multinational) companies and consortia and private corporations respectively. These companies and consortia are described as representing an intermediate form of organization between the public international agencies and private corporations operating on an international scale. Their characteristics are accordingly examined by reference to such key indicia of personality commonly attributed to international organizations as immunities and privileges and dispute settlement. Examples given include Eurofima, Eurochemic, International Moselle Company, Air Afrique, the Scandinavian Airlines System, Intelsat, the African Development Bank, and the Bâle-Mulhouse Airport.

The chapter on private corporations offers a broad stocktaking and features a discussion of the notorious 'choice of law problem' and the doctrinal controversies surrounding it.

The question whether Jessup's essentially descriptive and procedural doctrine of 'Transnational Law' is the appropriate answer to the problem of the substantive applicable law for concession and development agreements, which forms the subject of the well-known McNair/Verdross-Mann/Friedmann controversy, is rightly perceived as of secondary importance. What really matters is the recognition that private corporations are undeniably a part of the international legal order and ought to be accorded a requisite measure of international legal personality. The author rightly affirms that the frequent role of legally separate public corporations as governmental agents of capital-importing countries in the making of contracts with private corporations from capital-exporting countries cannot justify the reduction of these transactions to private law agreements excluding State responsibility on an international level. A chapter on the procedural capacity of international organizations and private corporations before international judicial or arbitral tribunals supports the main proposition of the book that these entities 'are the concern of modern international law which continues to extend international personality to entities other than states'.

J. F. WEISS

Le Mécanisme de la prise des décisions communautaires en matière de relations internationales. By URAL AYBERK. Brussels: Établissements Émile Bruylant, 1978. 580 pp. Bfr. 2800.

For most international organizations relations with other subjects of international law, and in particular the conclusion of treaties with them, have not been matters of major significance. Thus the early reports to the International Law Commission on the question of such treaties showed that both the issue of representation and that of the interrelation between an organization and its Members as regards treaties concluded by one or the other were perceived as of theoretical rather than practical importance. The situation regarding the European Communities has been quite different. There the role played by the organization, on the one hand, and by its Members, on the other, in negotiations or other relations with third parties may reflect—and affect—the division of competence between them and be crucial in the development of Community policies. And this substantive problem in turn is reflected in the issue as to whether the powers of representing the organization are vested primarily in the Commission or in the Council of Ministers.

Mr. Ayberk describes and analyses in detail the manner in which the international relations of the Communities were handled from 1958 to 1970, under three main headings: cases of Community competence; cases of mixed competence; and cases of (member) State competence. The period was, in the words of the author, one of apprenticeship: patterns of behaviour were established; problems were considered; no doubt mistakes were made. A vivid image of the difficulties encountered in a new international endeavour emerges.

The subject-matter, as the author recognizes, is in constant flux, both as regards the development of Community competence and as regards the international implications of that development. The period following that dealt with by the author has seen major contributions by the European Court of Justice both to the division of competence between the Communities and their Members in international relations and to the issue of representation of the Communities. Problems of participation in and creation of other international organizations have been covered by the decisions; in this connection the possibility of conflict between the needs of the Communities and the rules of other organizations—implied but not considered in a Ruling of 14 November 1978—has not yet been fully faced. The independent role of the Communities in international affairs is more widely accepted, and the concerting of the member States in many aspects of foreign relations is becoming more pronounced. The somewhat pessimistic conclusions of Mr. Ayberk—that the development of the Communities' external action did not

adequately match the internal—may be less justified now than they were during the period covered by his study. The passage of time, however, in no way diminishes the value of that study as an analysis of institutional developments and of the processes of the making of international decisions in areas of importance for States. And it will remain of practical interest both to those concerned on one side or another in the international relations of the Communities and to those who, in other regions, are seeking to establish comparable forms of organization.

FELICE MORGENSTERN

Aboriginal Rights in International Law. By GORDON BENNETT. London: Royal Anthropological Institute of Great Britain and Ireland, Occasional Paper No. 37 (published in association with Survival International), 1978. vi+88 pp. £3.60.

The topic of aboriginal rights has long been an important one in the United States, and has more recently become prominent in Australia, Canada and elsewhere. The international ramifications of aboriginal rights were also, of course, the subject of classic treatises such as Vitoria's *De Indis*, and of early twentieth-century works by writers such as Lindley and Snow. However, this small but useful study is, in its author's words, 'the first attempt to survey the modern international law on the subject' (p. 1). It divides into four parts, of which chapter 3 (pp. 16–48), a subject-by-subject analysis of the I.L.O. Convention No. 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (1957), with its associated Recommendation No. 104, is by far the most substantial.

If, as the author suggests, the Convention 'lies at the core of the modern international law relating to aboriginal peoples' (p. 3), then his tone of quiet despair at the plight of native peoples would seem to be justified. Few countries outside the Americas with aboriginal populations have ratified it: in particular, Canada, Australia and the Soviet Union have not done so (p. 16). Moreover, the Convention's overriding emphasis is on the integration (one might say 'with all deliberate speed') of aboriginal communities into the 'national community' (see, for example, its title, preamble, Arts. 2 (1), 4, 7 (2), 12(1), 24, 28, and the various references to 'the framework of national laws and regulations'), an emphasis only partially offset by the prohibition of coercion (Art. 2 (4)) and other safeguards. In this context the author's criticism of the vagueness of Art. 7 (2) (at pp. 20–2) is entirely warranted.

Another target of criticism is Art. 11, dealing with the crucial problem of land rights. The entire section (pp. 29–42) on land rights is well informed and carefully considered (although the Australian statutory developments subsequent to the *Nabalco* case might have been mentioned, as well as (at p. 28) the Aboriginal Legal Rights Movement).

The difficulties of enforcing the Convention through existing I.L.O. machinery are clearly and bluntly described (pp. 43–8). Indeed, the author goes so far as to describe the Convention as 'moribund' (p. 47), which is surely, on the material presented here, something of an overstatement.

Three shorter sections deal with the status of aboriginal communities in international law (pp. 4–11), United Nations practice (pp. 12–15), and the relevance of general human rights conventions (pp. 49–60). All are rather too brief to add much to the valuable account of the I.L.O. Convention. Thus the emphasis on a *legal* concept of guardianship (apart from particular conventional institutions such as the mandate and trusteeship system) is mysterious, since it is not made clear exactly what content the concept is supposed to have (pp. 4–5, 7–11). Moreover the treatment of the status issues is flawed by a too-ready acceptance of what might be called the 'Westlake view' of the law in the later nineteenth century. The extent to which the *terra nullius* doctrine and its analogues was established then is doubtful—a point confirmed by the *Western Sahara* opinion but

already demonstrated, for example, by Alexandrowicz (whose work is unfortunately not cited). The *Western Sahara* opinion was not by any means the 'first' step in this direction (p. 6), although, as the decision showed, the absence of any doctrine of reversion means that nineteenth-century status issues are likely to be fairly marginal to the present-day problems of aboriginal communities. (The alternative view is, however, expressed in strong terms in the 1977 International N.G.O. Conference Declaration §§ 1-4, printed as Appendix 3.)

The treatment of United Nations practice is even briefer (pp. 12-15). The criticism of General Assembly Resolution 1541 (XV) for excluding most native communities from the scope of Chapter XI of the Charter meets the difficulty that Chapter XI (unlike Article 23 (b) of the Covenant) clearly refers only to 'territories'. The real problem with United Nations practice under Chapter XI is not its emphasis on territories (rather than diffused minorities) but its extremely restrictive application of the notion of a 'colony' (a term which does not appear in the Charter). A similar problem occurs in the final section on human rights, where a sweeping view is taken of the international law of self-determination, with little consideration of the difficulties presented by State practice. This chapter also contains a brief account of the Civil and Political Rights Covenant, and a rather more detailed discussion of the Racial Discrimination Convention (pp. 55-60). There is, however, virtually no mention of the Economic, Social and Cultural Rights Covenant.

Despite occasional quibbles (Vitoria delivered lectures on the laws of war, rather than merely reflecting on them! (p. 7)), there is no doubt that this is a useful and readable survey of the topic, intelligible to the layman but also (at any rate in Chapter 3) of value to the specialist. Apart from the points already made, this reviewer's only major disappointment was at the lack of more detailed consideration of a few central issues: for example, the extent to which integration, on any terms and at any time, is the proper end of tribal minorities (see pp. 19, 62-3, which represent a good start at the problems but do not go far enough), and the relevance and effect of attempting to preserve cultural and social integrity of groups through the civil and political rights of individual members rather than by the maintenance of special regimes (briefly canvassed at p. 52). But perhaps that is only to wish that the author had written a definitive study of the problem, rather than a useful introduction.

JAMES CRAWFORD

Fontes Juris Gentium. Series A; Sectio I; Tomus 6; Pars 1 and Pars 2; *Digest of the Decisions of the International Court of Justice 1959-1975*. Edited by RUDOLF BERNHARDT, MICHAEL BOTHE, JOSEF JURINA, and KARIN OELLERS-FRAHM. Berlin, Heidelberg, New York: Springer Verlag, 1978. 1672 pp. (continuous pagination) (including indexes). DM. 340.

The value of this series to the professional lawyer and those engaged in research is evident. As the preface succinctly states: 'Taken together, the volumes of this series present a comprehensive survey of the judicature of the World Court from its creation in 1922 up to the *Western Sahara* Advisory Opinion in 1975.' The texts are given in English and French, the authentic text being indicated. The apparatus of the series appears in English, French and German. Problems of categorization are solved in part by cross-reference. However, the question of admissibility of claims, which was prominent in the period covered, is not dealt with successfully. This is not to complain of omission of the relevant material. The problem is that it is fragmented under the diverse headings of 'nationality' and 'procedure of the International Court of Justice', the issue of local remedies appearing in the latter section.

IAN BROWNLIE

The Role of the United Nations in International Legislation. By HANNA BOKOR-SZEGÖ. Amsterdam: North-Holland Publishing Co., 1978. 192 pp. U.S. \$26.75; Dfl. 60.

The role of United Nations organs in the creation of general international law has for some time been a major object of juridical inquiry and disagreement. Undeniably, United Nations activities have had *some* formative influence: equally, no one could claim that law-declaring resolutions or codifying conventions automatically become part of general international law. The varieties of intermediate position thus tend to involve either a description of the ways in which United Nations activities have in fact influenced the development of the law or an analysis of how that process can have occurred. Of the former, it is not entirely clear what remains to be said, at least at a general level. The latter, of course, can only be persuasive if the influence of United Nations resolutions, etc., is placed against a coherent *general* theory of the sources of law. This study labours under a double disadvantage, since it presents only a brief and not self-consistent theory of sources, and since it avows (for most purposes, at least) a strictly conventional theory of law ('what is the role of international organizations in the making of agreements between States, i.e. in the acceptance of new norms of international law?' (p. 11)). If international law is regarded purely and simply as 'the making of *agreements* between *States*', then the United Nations (and other non-State activity) is condemned to a merely instrumental, one might say a secretarial, role. Thus:

General Assembly resolutions of a substantive character, after adoption, really affect the creation of norms in such a way that the expectation they express with regard to a certain desirable conduct shapes the practical and principled positions to be adopted by States *and will thus give rise to a demand for a legal regulation* (p. 72 (emphasis added)).

Equally, such resolutions, though

not sources of international law, may in a given case provide grounds for predicting the probable conduct of States (p. 73).

Both propositions may be true, but even if true they are generalizations of an extremely weak kind. Similar devaluing of law-making behaviour other than the direct consent of States is found in the brief and inadequate treatment of the International Law Commission (pp. 62–6) (its precise role is left quite unclear, and there is little discussion of the use made of the I.L.C. debates in the *North Sea Continental Shelf* cases (pp. 64–5)), and of the International Court, which 'in no way reflects the common stand of the international community' and has 'only an indirect effect on the establishment of new norms . . . in so far as it can influence the intention of Member States to create new international rules' (p. 21, but cf. p. 39). Consistently with this, the effect of the *Reservations* opinion is minimized: in creating a new rule about reservations 'a decisive role has been played by the United Nations General Assembly resolution based on the advisory opinion' (p. 62). The Court is even denied any role in monitoring compliance with treaties (p. 180 n. 51), on the basis that 'we are in general against the use of any clause that makes it possible to refer a dispute to the Court at the discretion of one of the parties involved'.

Despite these difficulties, the author manages to attribute a substantial role to the United Nations—a role doubtfully consistent with the restricted 'midwifery' function which the State-consent theory seems to require. The General Assembly, through its powers under Article 13 (1) (a), is able 'to play an *essential* role in the creation of international legal norms' (p. 27, emphasis added). The Assembly's role in formulating a new law of reservations was 'decisive' (p. 62). The 'character of the entire [law-making] process had *radically* changed as a result of the participation of international organizations' (p. 86 (emphasis added)) (despite the conclusion that no changes in principle have occurred: p. 85).

Apparent inconsistencies of this type occur in a number of places. Thus, although the

international law-making process is conventional (pp. 11, 12, 32, 44-5), rules not accepted by all (even a significant minority of) States may still be 'existing rules of customary law' (p. 31). In a case of an asserted regional custom, '*bona fide* State policy' requires non-participants to express their dissent or be bound (p. 43). Similarly, in the case of general international law, silence involves consent to a generally supported rule: an 'expressly negative attitude' is required to evade it (p. 45). What the status of *these* rules is, whether they have been consented to, is not discussed. Most strikingly, the development of *jus cogens* is 'incontestable', but 'starting from the theory of will, we can find no satisfactory explanation for the existence of peremptory norms' (p. 48). *Jus cogens* is made dependent on 'extra-legal factors' (p. 48), but to such striking effect that 'the scope of the peremptory rules . . . extends to all States' irrespective of their consent (*loc. cit.*). The writer, although in these passages close to very real and interesting issues, shies away from them, preferring rather bland or general descriptions of United Nations convention-making activities (while reverting from time to time to the more fundamental, worrying problems (*cf.* p. 72)). The extent of this diversion from real issues is most obvious in Chapter IV (the largest in the book), an inquiry into whether treaties adopted by international organizations are 'really of a universal character', whether such treaties are 'of universal interest'. In this inquiry 'a secure starting point' is that 'compliance with the purposes and principles of the Charter can be taken as a basis for the substantive qualification of treaties of universal interest' (p. 93). There seems to be little or no perception that general principles such as those in Articles 1 and 2 of the Charter require specification and particularization if they are to be meaningful, and that the processes of negotiation, compromise, and balancing of interests are an inevitable part of *any* treaty-making process. The search for 'universal interest' is of baffling generality, especially when it relates to *categories* of treaty. Conclusions such as:

What is essentially expected from the codification of international law is that it should express the universal interests of States at the time of codification (p. 119)

can only be described as trite or meaningless, according to taste.

There are also a number of specific points with which one would take issue. Article 55 (1) of the Charter is regarded without argument as establishing a firm duty for States to respect 'the rights included in the catalogue of human rights' (p. 22). There is no reference to the role of the International Court in the field of self-determination, or the difficult problems involved in that concept (which the author regards as one of *jus cogens*; p. 178). In a single paragraph we are told both that the 'protection of human rights has become an object of regulation under international law' and that 'the guarantees of human rights and the extent of their realization shall *entirely* remain within the domestic jurisdiction of any State' (p. 121, *emphasis added*). The author is confident as to the 'impending complete liquidation of the colonial system' (p. 143) (despite the reference in Chapter XI of the Charter to after-acquired territories). Apparently the law of State succession is also on the way out, since it 'relates almost exclusively to cases of the emergence of new States from the disintegration of the colonial system' (p. 143). So too, one must be relieved to know, is severe racial discrimination, since 'the most flagrant cases of racial discrimination today occur in colonial territories' (p. 178). The Vienna Convention provisions on reservations are said to be *de lege ferenda* because the Convention is not yet in force (p. 150).

Finally, a number of passages demonstrate a disturbing degree of political partiality: for example, a main feature of the 'power relations prevailing in the world today' is said to be 'the conflict between the aggressive aspirations of the imperialist States and the efforts made by the socialist States to promote the cause of peace and security' (p. 99; see also at pp. 93, 102). Partisan references of this sort are no less out of place in scholarly work for being occasional aberrations in a study unsatisfactory for other reasons.

JAMES CRAWFORD

L'Interdiction de la discrimination dans le droit international des droits de l'homme.
By MARC BOSSUYT. Brussels: Établissements Émile Bruylant, 1976. xii+262 pp.
Bfr. 625.

For this author, 'discrimination' in the field of human rights is of a nature quite different from that which might operate, for example, in the realm of international economic relations. He consequently confines his study to the international law aspects of the former and, in so doing, he bases himself on the many and various international instruments adopted since 1945, on the special jurisprudence of the European Commission and the European Court of Human Rights, and, in particular, on the judgment of that court in the *Belgian Linguistics* case.

Certain problems of terminology are briefly examined. The author observes that the word 'discrimination' has latterly come to be confined to use in a pejorative sense. By contrast, the terms 'distinction' and 'differentiation' (whether in English or French) have a complementary role in describing, first, a difference in treatment which may or may not be permissible; and secondly, a difference in treatment which is justifiable.

The first principal section of the work attempts to state and to define the rule prohibiting discrimination. Dr. Bossuyt analyses the provisions adopted in various human rights conventions and he isolates three elements to be identified if discrimination rather than distinction or differentiation is to prevail. These he classifies as: the *ground* ('*le motif*') on which the difference in treatment is based; the *right* in respect of which the difference operates; and the element of *arbitrariness* ('*l'arbitraire*') which, in the author's view, is precisely what distinguishes a discrimination from a distinction. (Cf. McKean's analysis, this *Year Book*, 44 (1970), pp. 177-92.)

To each of these elements is devoted one chapter of analysis, that dealing with the last-mentioned topic being perhaps the most interesting. In the author's view, it is relevant to distinguish between 'simple' discrimination and 'arbitrary' discrimination. 'Simple' discrimination is unlawful where it is founded on a ground expressly forbidden by a treaty norm; 'arbitrary' discrimination, on the other hand, is unlawful in the field of human rights purely because it is arbitrary: '*l'arbitraire en matière de droits de l'homme est interdit par le droit international.*' Dr. Bossuyt adduces substantial support in favour of this rule as a general principle of law, and draws upon many constitutional provisions guaranteeing equality in and before the law, as well as upon multilateral texts and the Charter of the United Nations.

He criticizes the European Court of Human Rights for having attached such importance in the *Belgian Linguistics* case to the aim or objective of the distinction which is challenged. It is enough, he argues, that the distinction in fact violates equality of treatment. To engage in an assessment of the legitimacy of aims is undesirable and leads both to involvement in internal politics and to reliance upon subjective factors. But that danger would seem to lie equally before any judge who attempts to gauge a level of arbitrariness or assess a degree of pertinence. For Dr. Bossuyt offers the following doctrinal definition of discrimination: '*Dans le droit international des droits de l'homme, l'expression "discrimination" vise une différence de traitement dans la reconnaissance, la jouissance ou l'exercice d'un droit de l'homme ou d'une liberté fondamentale fondée sur un motif qui n'est pas pertinent pour ce droit ou cette liberté.*'

The author does concede that determining the pertinence of the ground of distinction is a delicate operation, and that it implies the existence of a discretion to choose between two courses. However, this is an open area which Dr. Bossuyt feels he has confined to the minimum.

In the second principal part of the study Dr. Bossuyt considers the application of the rule prohibiting discrimination, and he illustrates related problems by reference to the jurisprudence which has developed around the European Convention on Human Rights. He also analyses the provisions of other multilateral conventions, considers the question of an 'independent role' for the rule ('*un faux problème*'), and looks at length at the

difference between, on the one hand, civil and political rights and, on the other hand, economic, social and cultural rights. He finds here an intrinsic difference, which reflects that between negative and positive obligations. He also advances, not entirely convincingly, a resources-based difference: '... contrairement aux droits civils, les droits sociaux nécessitent un effort financier de l'État: l'octroi des droits sociaux coûte de l'argent, alors que le respect des droits civils n'en coûte pas.' In the author's view, the cost of providing the basic guarantees for civil rights can be justifiably disregarded, because their provision is one of the fundamental conditions of Statehood. Nevertheless, while civil rights may be invariable and absolute, and social rights may be variable and relative, Dr. Bossuyt argues strongly that the principle of non-discrimination applies equally to both.

It is therefore not surprising to find that the author opts for the individual as a direct beneficiary of rights conferred by international law, although his rejection of the dualist conception may upset those of an Anglo-Saxon inclination. The primacy of the rule of international law, assumed rather than argued, is nevertheless offered as an interim solution to today's imperfect world where the international judge remains as yet powerless to intervene directly within the domain of domestic law.

The interest of Dr. Bossuyt's study lies in his elaboration of the principle of non-discrimination beyond the limitations of modern conventions. It remains uncertain, however, whether the working definition of discrimination which he advances is a significant improvement over those offered elsewhere. It does invite 'the judge' to look with care and attention at each difference of treatment, at its basis, and at the relevance of the distinction to the enjoyment of the right in question; but it is debatable whether the aim or objective of the difference in treatment can ever be fully ignored (cf. Article 1 (4) of the International Convention on the Elimination of All Forms of Racial Discrimination). Nevertheless, this book should provoke thought and further inquiry.

GUY S. GOODWIN-GILL

Northeast Arctic Passage. By WILLIAM E. BUTLER. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. 199 pp. Dfl. 70; U.S. \$32.50.

Malacca, Singapore and Indonesia. By MICHAEL LEIFER. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. 217 pp. Dfl. 70; U.S. \$32.50.

The Persian Gulf and the Strait of Hormuz. By R. K. RAMAZANI. Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, 180 pp. Dfl. 70; U.S. \$35.

These volumes are the first to appear in a series entitled *International Straits of the World*, edited by Gerard J. Mangone. The first of the volumes is concerned with the legal status of straits adjoining the northern coasts of the U.S.S.R. between the Barents and White Seas in the west and the Chukchi-Bering Sea in the east. The number of straits involved, in the hydrographic sense, is fifty-eight. The author is well known as an expert on international law in Soviet doctrine and practice and the new study in a sense complements Professor Butler's work on *The Soviet Union and the Law of the Sea* (1970), which said little about straits. The present work has much to offer the international lawyer and no doubt other specialists. A great deal of information is presented with clarity and the book is nicely organized. As examples, there is very useful material on the Arctic continental shelf, historic straits, problems concerning icepacks and diplomatic disputes with the United States. The whole is serviced by sketch-maps. Care is taken to report the diversity of Soviet doctrine and to distinguish between doctrine and the actual practice of the organs of State.

Over all Professor Butler achieves his purpose, but one or two reservations should be made. The section on the position in general international law (pp. 128-44) is useful

but none the less fails to provide a sufficiently broad legal perspective. Moreover, the treatment of the recent proposal for 'transit passage' is rather odd (pp. 136-7, 146). The text fails to indicate that 'transit passage' would involve a very considerable change in the Soviet position on the authority of the coastal State. Furthermore, two issues require further investigation. First, to what extent may claims to 'historic straits' (see pp. 86-7) be used as a basis for avoiding the local impact of rules of general international law? Secondly, certain waterways described in this book are only usable, it would appear, with the assistance of ice-breaker pilotage and air reconnaissance: is it not possible that the necessity for such services takes the waterways out of the legal category of international straits?

The second volume in the series is concerned with two related matters, the archipelagic baselines of Indonesia and the set of linked problems concerning the Straits of Malacca and Singapore. The Indonesian sections focus on the Sunda, Lombok, Makassar and Ombai-Wetar Straits. The author, though not a specialist in international law, is an expert in the international relations of south-east Asia. The material expounded is of great relevance to the concerns of lawyers and Dr. Leifer's study is a most helpful addition to the literature. Moreover, the inquiries are carefully ordered, presented with clarity and well documented. Perhaps the special virtue of the book is its success in linking the legal issues, the precise history of State relations in the area, and the description of policy-making episodes.

A great deal of information is provided on such matters as the origin of the 'archipelago principle' and the problems of enhancing the safety of navigation in the Straits of Malacca and Singapore. The detail is deployed in the most helpful way and insights are provided. Thus, for example, very modest recommendations concerning tanker passage in the Singapore Strait are seen by third States as a threat to the principle (as they see it) of free passage of naval vessels (p. 75).

Dr. Leifer also provides a general account of the legal regime of straits (pp. 86-104) which is helpful within certain limits. The literature referred to is within a rather narrow range. In particular, there is an absence of a historical *legal* perspective, especially in relation to the passage of warships. The effect of the provisions of the 1958 Territorial Sea Convention is not conveyed accurately (pp. 88-9). However, the key point is made (at p. 89): which is that the 1958 Convention places the question of straits in the context of innocent passage in the territorial sea. This point was made by O'Connell in 1975 (quoted by Dr. Leifer), and, incidentally, by the reviewer in 1966. The fact that the framework of thinking has long been confused is at least a part of the present problems. Neither Professor Butler nor Dr. Leifer refer to the excellent section on international straits to be found in the *British Digest of International Law*, edited by Clive Parry, Vol. 2b (1967).

The study by Professor Ramazani constitutes the third volume of the series. Whilst the factual material presented is of some value to the student of the legal problems of straits the treatment, which is of great interest, is concerned with the general structure of political, economic and strategic problems of the region as a whole. Not very much of the text is devoted to legal issues as such. However, there is a discussion of the attitude of the States of the region towards the concept of transit passage (pp. 80-8).

IAN BROWNLIE

United Nations Peace-keeping: Legal Essays. Edited by ANTONIO CASSESE. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978. xvi+255 pp. Dfl. 60.

The essays in this book are partially up-dated versions of some of the papers presented at The Hague Academy's Centre for Studies and Research in 1975.

The first essay is a general assessment of United Nations peace-keeping by Rosalyn Higgins. On the whole it is a good introduction, and has some useful things to say about

the Committee of 33, although in places it is too brief; for instance, one would have liked to see a development of the suggestion on p. 4 that 'not every Chapter VII measure is enforcement'. But the essay is surprisingly careless in a few places (e.g. the confusion between Articles 41 and 42 at the foot of p. 2).

Two of the essays deal with particular U.N. Forces. Alejandro Rodríguez Carrión contributed a good essay on the U.N. Force in Cyprus. Yoel Tsur's essay on U.N. peace-keeping operations in the Middle East from 1965 (*sc.* 1956) to 1976 is of a much lower standard, and the five paragraphs on pp. 191-2 and 194-5 which Mr. Tsur (who is at present Commissioner of Patents, Designs and Trade Marks (but not copyright) at the Ministry of Justice in Israel) reproduced without acknowledgement from your reviewer's *A Modern Introduction to International Law* would have been more accurate if they had been lifted from the 1977 edition instead of the 1971 edition.

The remaining essays deal with problems of a more general character. Dan Ciobanu's thought-provoking essay on the power of the Security Council to organize peace-keeping operations makes the interesting suggestion that the Security Council's power is derived, not from the Charter, but from a new 'customary rule of the law of the United Nations' which has become law because all member States have consented or at least acquiesced. Antonietta Blase's essay on the role of the host State's consent contains a good treatment (pp. 69-73) of the problems raised by the withdrawal of U.N.E.F. in 1967. Erkki Kourula's essay on peace-keeping by regional organizations is too brief to do justice to the many issues involved, but Antonio Cassese contributed a good summary of the two super-powers' movement towards consensus about the way in which peace-keeping operations should be organized. Marianne von Grünigen's essay on neutrality and peace-keeping deals with a subject which has hitherto received little attention from lawyers, but which is obviously important, in view of the desire of the United Nations to compose peace-keeping forces of contingents from States which are acceptable to both parties to the dispute. Finally, Bert Röling has some perceptive things to say about the causes of conflict, and thus contributes to an understanding of the environment in which peace-keeping operates; but, since his essay says little about peace-keeping as such, it should have been placed at the beginning of the book, as an introduction, instead of coming at the end.

As often happens with collections of essays, the book is of uneven quality, but the good parts outweigh the bad. The book is well-bound, but the proof-reading is poor, there is no index, and the footnotes are grouped at the end of chapters, which makes it awkward to refer to them. Some of the essays were originally in French, and have been rewritten in English or translated into English, with results which sometimes leave much to be desired.

MICHAEL AKEHURST

Human Rights and the South African Legal Order. By JOHN DUGARD. Princeton: Princeton University Press, 1978. xix+470 pp. (including bibliography, tables of statutes, cases, and index). £18.40.

Although Professor Dugard is now recognized as an international lawyer of some distinction, this is not a book about international law as such. It is in fact a study of the South African legal system and the part it plays in the South African body politic. Its five main parts are entitled successively 'the legal framework', 'human rights and the law', 'the political trial', 'the political process and human rights', and 'a new approach to law'.

What is of real interest to the international lawyer is the way in which the author uses the European Convention on Human Rights, decisions by the European Commission and judgments of the European Court as a yardstick by which the merits or demerits of the South African legal system can be measured. Thus, in assessing the protection afforded under South African law to personal freedom, he invokes Article 2 of the European Convention (and, indeed, the U.N. Covenant on Civil and Political Rights), the

European Commission's decision on the compatibility of 'whipping' or 'birching' with Article 3, the European Commission's decision on the 'torture' allegations brought against the United Kingdom by the Republic of Ireland, and the European Commission's decisions on the compatibility of West Germany's dissolution of the Communist Party with the Convention's provisions on freedom of speech and of association. It is, of course, a commonplace that the European Convention has had an influence beyond that to which, as a treaty, it would be strictly entitled. South Africa is not a party, and the Convention's provisions are not in any sense binding on South Africa. Yet it is difficult to deny that, as a yardstick of what standards a civilized legal system should attain, the Convention has a legitimate role to play. It is by no means unlikely that, in the domain of State responsibility, the Convention might be used as a guide to those elusive minimum standards of international justice by which international fault in the treatment of aliens is judged: the technique of comparison would be much the same as that used by Professor Dugard.

The other source of interest to the international lawyer is the way in which the book carefully analyses apartheid. Successive resolutions of the General Assembly have castigated apartheid, and it has been regarded as a fundamental breach of the mandates agreement as applied in South West Africa. What one now has, in this book, is a factual, dispassionate analysis of the actual operation of apartheid within the legal system, and what emerges with absolute clarity is that it represents a denial of fundamental human rights.

The concluding Chapter on 'a new approach to law' is highly critical of the passivity displayed by the South African legal profession towards apartheid. Professor Dugard attributes this in part to party differences among lawyers, but also in large part to the way in which South African lawyers think about law. As he says, 'South African lawyers are peculiarly prepared to accept as law anything that calls itself by that name or is printed at Government expense in the Government Gazette' (p. 393). He castigates the excessive positivism which he believes to be inherited from the predominant legal philosophy of nineteenth-century England, influenced so heavily by Austin and Bentham, and argues for a new approach combining legal realism and natural law. These two schools of thought do not strike one immediately as happy bed-fellows and, as Professor Dugard disarmingly admits, 'this may sound ridiculous' (p. 400). However, he makes out a fair case for an approach which combines realism with a critical analysis of values, for realism accepts a certain subjectivity in the judge and this allows the application of moral values. The values Professor Dugard would like to see are, of course, those contained in the various formulations of human rights: they are not those reflected in the policy of apartheid.

In seeking to redress the excessive positivism of the English legal tradition, Professor Dugard may derive some comfort from recent trends in England itself. In *Ahmad v. I.L.E.A.*, [1978] 1 All E.R. 574, Scarman L.J. took up a theme he had earlier advanced in his 1974 Hamlyn Lecture. Faced with an argument based on Article 9 of the European Convention on Human Rights, and knowing full well that the Convention has not been incorporated into English law by statute, he said:

It is no longer possible to argue that because these [treaty obligations] do not become law unless enacted by Parliament our courts pay no regard to them. They pay very serious regard to them: in particular they will interpret statutory language and apply common law principles whenever possible so as to reach a conclusion consistent with our moral obligations.

There is, of course, a difference: the United Kingdom is a party to the Convention, and South Africa is not, so any South African Court would face far greater difficulties in adopting moral values contained in such a treaty. Even more fundamentally, the body politic in the one country does generally share those values, whereas all the evidence suggests that in the other, South Africa, it does not. Can the judges adopt values not generally shared by the body politic?

Quite what effect Professor Dugard's book will have only time will tell. What can be said at this moment of time is that it is a book of careful scholarship and remarkable courage.

D. W. BOWETT

Private International Law, Volume III, Special Part—Obligations (Contracts, Torts. An Outline). By ALBERT A. EHRENZWEIG and ERIK JAYME. Leyden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications Inc., 1977. xiii+156 pp. (including bibliography and index). Dfl. 58; £24.25.

This learned book was to have been the third extensive volume in this series, but the late Professor Ehrenzweig, shortly before he died in June 1974, suggested that the work done to date be published 'as a kind of outline'. It is that outline, completed by Professor Jayme, which now appears. Professor Jayme was largely responsible for the first sub-chapter on contracts, and Professor Ehrenzweig for the second sub-chapter on torts.

As in the previous volumes, the emphasis is on American judicial decisions in international, as distinct from inter-State, cases. There can be no doubt that no proper understanding of American conflicts law can be achieved without the ability to segregate those decisions which result from constitutional requirements or limitations, and in particular from the full faith and credit clause (Article IV, section 1), the due process clauses (Fifth and Fourteenth Amendments) and the equal protection clause (Fourteenth Amendment). But of course by no means all (and not even a majority) of inter-State conflicts cases are decided according to, or even influenced by, constitutional standards. Some use is made of inter-State conflicts cases in the present volume, and this reviewer would have welcomed more guidance as to which types of inter-State conflicts cases may not safely be relied upon in the international context.

Professor Ehrenzweig was a vigorous critic of the *Second Restatement*, and it is, no doubt, the division of responsibility between the authors which results in the criticism of the *Second Restatement* being somewhat more muted in the section on contracts than in the section on torts. Thus, in the former section, the *Second Restatement's* most significant relationship rule is described merely as a 'non-rule' (p. 45), in the tort section it becomes 'unsupported by authority, unworkable and undesirable' (p. 74), and is a 'ubiquitous, unsupported and unsupportable non-rule' (p. 94).

The volume is characterized by learning and the extensive use of comparative sources. The contract section contains useful and stimulating treatment of the 'presumption of validity' (formerly Professor Ehrenzweig's Rule of Validation) and of the problem of silence as acceptance of a contractual offer. The fourth section contains an especially lively treatment of torts involving injury to reputation (adopted from Professor Ehrenzweig's Hague lectures). Not least (but certainly not only) because it is an outline, the style makes some of the book far from easy to follow, and it is not free from obscurity or jargon, but it is recommended to serious students of the subject. There is an excellent bibliography.

LAWRENCE COLLINS

Cod Wars and how to lose them. By SIR ANDREW GILCHRIST. Edinburgh: Q Press, 1978. 122 pp. £5.50.

Having acquired a reputation as an expert on fish by catching salmon in Lake Taupo in New Zealand, the author was appointed in 1956 as British Ambassador in Iceland, a post which he held for the greater part of the first 'cod war' of 1958-61.

The first part of the book contains an urbane and sympathetic account of the Icelandic people, way of life, geography, history and politics. It also contains a number of anecdotes of diplomatic life, with the same mixture of comic eccentricity and occasional melodrama as Lawrence Durrell's Antrobus stories. On one occasion the doorbell rang early in the

small hours of the morning; the housemaid answered it, and came upstairs to report: 'There is a man at the front door who says he wants to shoot you—will you please come down.' (What he really wanted was to have his whisky bottle re-filled.) But, alas, the well-publicized story that the author prevented a mob from storming the Embassy by playing the bagpipes turns out to be untrue.

Most of the book is concerned with the first 'cod war'. It is a sad story—a vicious circle of increasing Icelandic obstinacy leading to increasing British obstinacy, and increasing British obstinacy leading to increasing Icelandic obstinacy. The mixture of 'cold war' and 'cod war' produced some odd results; one of the reasons given by Whitehall for resisting Iceland's claims was that they had been fomented by the Icelandic communists, which was far from true. On the other hand, the United States put pressure on Britain to placate Iceland, because the United States was afraid that the dispute between Britain and Iceland might drive Iceland to leave N.A.T.O. and close the American base at Keflavik.

International lawyers may be pained by some of the author's remarks about international law. He misunderstands the *Norwegian Fisheries* case of 1951, and almost suggests that the dispute between Britain and Iceland was the main issue at the Geneva conference of 1958. He writes that 'law is the command of the stronger' (p. 59) and that 'in the absence of a supreme court (which the [International Court at The] Hague is not), force was bound to win, as it did' (p. 55). But, if the 'cod war' had been solely a trial of strength, Britain could, and would, have sunk all of Iceland's gunboats within minutes. The author does not examine why Britain refrained from doing so, but surely one of the reasons is that Britain knew that the use of force on this scale would have been condemned throughout the world as a violation of the United Nations Charter. Elsewhere the author admits that international law did exercise a considerable influence on the actions of both sides; he says that 'the Icelanders were (and are) an intensely legalistic people, so that they needed time to convince themselves that law was on their side' (p. 105), and he complains that British policy on fisheries was being made by the Attorney-General, Sir Reginald Manningham-Buller (p. 106).

He regards the influence of lawyers on British fisheries policy in the late 1950s as a departure from the normal British practice, whereby the Foreign Office Legal Advisers 'exist to provide advice only when asked for it', and he ascribes this aberration to 'post-Suez trauma'—the low morale of the Foreign Office following the Suez fiasco 'made room for the intrusion [*sic*] of the law' (p. 106). But one suspects that what really distinguished the Icelandic fisheries dispute from most matters handled by the Foreign Office was not its timing, but its subject-matter. Lawyers play a peripheral role in most diplomatic negotiations because most diplomatic negotiations are not about legal disputes. Lawyers played a more important role in the Icelandic fisheries dispute because it was a dispute about law, and not because it took place shortly after Suez; when the Foreign Office archives are published in the 1980s, they will probably reveal that lawyers exercised as much influence over British policy in the early stages of the dispute (e.g. in 1954) as they did in 1958.

The author blames the lawyers for Britain's inflexibility in negotiations with Iceland. With respect, this is an over-simplification. Looking back, it is clear that Britain adopted an excessively static view of international law, by failing to foresee the demise of the three-mile rule and by underestimating the movement away from it which had already taken place. But, given Britain's belief that international law did not allow States to claim exclusive fishing rights for more than three miles (or maybe four, in the case of Scandinavian countries), the fact that Britain was prepared to offer Iceland *anything* beyond four miles represented a big concession from the British point of view. Unfortunately it was not big enough to satisfy Iceland. No doubt Britain's reluctance to offer more to Iceland was partly caused by fear of creating a precedent which could be invoked by other countries, which were regarded as less worthy of sympathy because they were less dependent

on fishing than Iceland, and fear of creating precedents is a fear which often afflicts lawyers, particularly in international law, which is largely based on custom; but the fear must also have been shared by the British fishing industry, whose influence over British policy was at least as great as that of the lawyers.

The result was that all Britain's concessions to Iceland were either too little, or too late, or both. More generous concessions at an earlier date would not have increased Iceland's appetite, as the British government seems to have feared (was it still suffering from a 'post-Munich trauma'?), but would probably have reduced it. Whether multilateral agreement on twelve miles at Geneva in 1958 would have prevented Iceland claiming more at a later date, as the author implies on p. 106, is open to doubt, but, if Britain had offered Iceland more generous terms for a bilateral agreement in 1958, the outcome would probably have been more favourable to the British fishing industry than the settlement eventually reached in 1961; by failing to offer a little more in 1958, Britain ended up by having to offer much more in 1961. This mistake, like other mistakes made by Britain in 1958-61, was repeated by Britain in the 'cod wars' of 1972-3 and 1975-6 (pp. 109-10), and in June 1976 Britain accepted terms which were far less favourable to her than the terms which Iceland had offered, and which Britain had rejected, in November 1975. But by June 1976 Britain was already preparing to follow the trail which Iceland had blazed, and to claim her own exclusive fishing zone of 200 miles.

MICHAEL AKEHURST

Legal and Institutional Aspects of the International Monetary System. Selected Essays. By JOSEPH GOLD. Edited by JANE B. EVENSON and JAI KEUN OH. Washington, D.C.: International Monetary Fund, 1979. xx+633 pp.

The author of this book was from 1946 a member and from 1960 until his retirement in 1979 the Director of the Legal Department of the International Monetary Fund and its General Counsel. During this period he was a prolific writer on numerous aspects of the Fund. Drawing upon his unique knowledge and experience of the Fund's activities, practices and attitudes, he published no fewer than four books on it and at least fourteen pamphlets and innumerable articles in the Fund's Staff Papers as well as other periodicals—all of them dealing with the Fund. There is hardly a single point in the Fund's structure, history or business the legal character and effect of which has not been analysed by Mr. Gold to such an extent that one sometimes wonders why it is that a single international organization of a very specialized nature should merit so much discussion. Indeed, since in the words of Mr. Samuel Brittan (*Financial Times*, 17 September 1979) 'there can be few institutions the reality of which is so different to the myths which surround them as the International Monetary Fund', much of Mr. Gold's writing has been disproportionate in that he has tended to make too much of too small a point or to overestimate the general significance of a point peculiar to the Fund or to expect too much of the law where economic forces are more effective or to become too ingenious an apologist of somewhat dubious developments. In so far as the International Monetary Fund provides lessons for the general law of international organizations its experience is valuable, but its specific importance, notwithstanding the publicity it engendered, was at all times in the balance, for it remained to be seen whether it could withstand a crisis. In fact, as we now know and as some had long feared, as a monetary institution the Fund collapsed under the impact of the events set in motion not later than 15 August 1971, while as a lending institution it managed to hold its own and even to expand. The two functions, of course, are quite different, though the title of the present book does not draw the distinction. Yet Special Drawing Rights, for instance, as an international reserve asset of a novel type (which are much discussed, but nowhere defined in this volume) surely do not form part of the international monetary system which the founding fathers envisaged at Bretton Woods and which was characterized by the par value system.

The present book, Mr. Gold's fifth on the Fund, reprints a fraction of his work, namely fourteen essays which had appeared between 1967 and 1977 'outside the Fund', as the editors put it. It is introduced by a completely new chapter entitled 'Law, Change and Adaptation in the International Monetary System' (pp. 3-73) which is specially interesting in that it contains a survey of what follows. Not all of this, however, is still relevant. In particular, when on 1 April 1978 the Second Amendment of the Articles of Agreement took effect, the system created by the all-important Article IV disappeared. Many of Mr. Gold's well-known and partly very questionable views on Article IV and its implications may now be disregarded. There is, however, one point in the pre-1978 history of the Fund which continues to trouble some international lawyers. 'Floating' as it was practised for many years by some, later by most, perhaps all States was inconsistent with the Articles of Agreement. Did it become lawful as a result of an emerging custom, acquiescence or waiver? In view of the detailed provisions in the Articles of Agreement about amendment it would seem to be impossible to give an affirmative answer, although some scholars have expressed different opinions. It is satisfactory to note that Mr. Gold reprints an article on dispensing and suspending powers of international organizations which he had published in 1972 in Holland and in which he explains and apparently supports the Fund's tolerance as a mere failure to impose sanctions rather than as dispensation or waiver (see, in particular, p. 368). The attitude of member States will have to be seen in the same light. In an article published in 1973 Mr. Gold speaks of an 'extra-legal regime' practised by 'a floating world' (p. 556). What does this mean? Was the regime illegal? Was it legal because the relevant provisions of the Articles of Agreement had without amendment been repudiated and replaced by temporary palliatives? General international law might gain much from a clear legal analysis of the effects of shattering events, but in 1973 Mr. Gold could not and in 1979 he does not supply it.

An essay which has particular significance for general international law and the scope of which is not strictly limited to the Fund is the twelfth, 'On the Difficulties of Defining International Agreements'. It originally appeared in a work which is likely to be inaccessible to most, viz. *Economic and Social Development: Essays in Honour of Dr. C. D. Deshmukh* (Bombay, 1972). Mr. Gold's examples are taken from the Fund's practice, but the lesson he teaches is that in many contexts very careful investigation is required before a document having the appearance of an agreement in the nature of a treaty can in fact be considered as such.

This volume is a well-deserved tribute to a man whom the editors very justifiably describe as 'a scholar, a highly trained lawyer and a lucid thinker' whose work makes it apparent 'that he has been singularly aware of the legal, economic, political and institutional aspect of change in international monetary relations' (p. xvii). F. A. MANN

International Law and the Movement of Persons between States. By GUY S. GOODWIN-GILL. Oxford: Clarendon Press, 1978. xxviii+324 pp. £14.00.

Emigration and immigration belong, according to the traditional doctrine, to the reserved domain of domestic jurisdiction and have hitherto received but scant treatment from the angle of international law. The central thesis of the work under review is that the competence of States to regulate the conditions of entry of aliens, their treatment after admission and the permitted circumstances of their expulsion, commonly consigned to the realm of sovereign State powers, is clearly limited by established and emergent rules of international law.

The book is divided into three parts: preliminary matters, the entry and exclusion of foreign nationals, and expulsion. Part III on expulsion has already been published in this *Year Book*, 47 (1974-5), pp. 55-156.

The author has, in the first Part, pertinent things to say on nationality in international

law: that it is the general view that recognition may not be accorded to imposition of nationality without request or consent unless the individual has a genuine connection with the State by both parentage and permanent domicile. He emphasizes the distinction established by the International Court of Justice in the *Nottebohm* case (*I.C.J. Reports*, 1955, p. 4) between nationality as defined by municipal law and the right of the State of nationality to exercise protection, which is determined by international law. State practice is analysed, in this and other parts, with particular reference to the law of the United Kingdom, the United States, France and the Federal Republic of Germany. As regards the right of entry the example of British nationality in the sense of the quality of being a British subject or Commonwealth citizen hardly lends itself to generalization owing to the *sui generis* character of the Commonwealth and the demise of the 'common status' as a status based on common allegiance to the British Crown and the right of entry into the member States. The author concludes that municipal law may make distinctions between different categories of nationals as regards their right of entry. He correctly states that whenever a right of entry can be said to exist, it may usually be traced back, apart from municipal law and treaties, to general international law, in so far as this affirms the duty of a State to receive back its nationals expelled from another State 'or, possibly, insofar as it recognizes the human rights aspect and the right of entry as belonging to the individual citizen' (reviewer's italics).

In the chapter on 'International Law and the Passport Regime' the author rightly underlines the character of the passport as evidence of the returnability of the holder to the issuing State—this in spite of the fact that the State's right of protection and its duty to admit its nationals flow from the individual's personal status rather than from the possession of a passport. The author asserts that, under international law, the passport creates an obligation for the issuing State to admit the holder in case of expulsion.

The question of the international minimum standard for the treatment of aliens and the influence of the developments regarding human rights are examined in relation to the entry and exclusion of aliens. It is somewhat surprising that in the review of judicial decisions regarding the treatment of aliens the *Oscar Chinm* case (*P.C.I.J.*, Series A/B, No. 63, p. 65) is not mentioned.

In the present evolutionary stage of international customary law of human rights, the author sees in the principle of non-discrimination one of the *general* limitations already binding upon States. He considers different treatment on account of race as contrary to *jus cogens*, but thinks that the principle also expressly prohibits certain other types of distinction between aliens.

In the second Part the author considers—while admitting that immigration policy is of necessity influenced by political and demographic considerations—that the distinctions drawn in recent immigration legislation of the United Kingdom between different classes of citizens operate in fact as racial ones and are therefore contrary to the principle of non-discrimination, while the discrimination practised in immigration control by the United States and Canada is seen by the author as more broadly based. He recognizes, however, that, except in those areas in which treaties or peremptory norms such as non-discrimination operate, it is not easy to bring entry and exclusion of aliens within the bounds of international law. In the following chapters obligations to grant admission imposed by international law are surveyed: to refugees under the principle of *non-refoulement* (non-return to the country of persecution) embodied in treaties but regarded as a general principle of international law; to political offenders; to diplomatic and consular officers, special missions, international officials, representatives of member governments of international organizations for the exercise of their functions; to crew members of ships and aircraft.

Wider obligations exist on a regional level, i.e. under the European Convention on Human Rights and the Treaty of Rome, which provides for the free movement of 'Community workers' between member States, and, to a certain extent, under bilateral treaties of commerce and establishment.

As regards expulsion, Oppenheim's statement that the State's discretionary right of expulsion may not be used in an arbitrary manner is of little help. Expulsion is rarely resorted to purely arbitrarily and arbitrariness is difficult to prove. Determination by an impartial organ whether the borderline between discretion and arbitrariness has been overstepped, which Oppenheim advocates, has, alas, been rarely resorted to in practice.

Since the purpose of expulsion is the protection of the interests of the State, expulsion for ulterior motives such as confiscation of the expellee's property is according to the author contrary to general international law and the principle of good faith; *refoulement* and extradition of an offender to a State where he may be prejudiced for irrelevant reasons may be contrary to treaty obligations and even to general international law if one recognizes the existence of humanitarian obligations owed by States *erga omnes* as has been held repeatedly by the World Court. In present international law this is more likely an obligation to a regional community if, for example, expulsion violates the obligations accepted under the European Convention on Human Rights. 'Disguised extradition', i.e. deportation to a State which wishes to prosecute the person, has rarely been considered unlawful, although the contrary opinion was expressed by the Institute of International Law in 1892, but it would be if resorted to *mala fide*.

Reasons of *ordre public*, so frequently invoked, must be of a particularly serious nature. The expelling State's interests have to be balanced against those of the individual, i.e. the principle of proportionality recognized by German jurisprudence. In spite of its harshness expulsion is not regarded as a punishment and not all the safeguards of due process are available to the alien threatened with expulsion. While one cannot speak of a 'right of residence', one can say that long-term residents have a 'legitimate expectation' to remain in the country as is evidenced by the greater safeguards accorded to long-term residents in the practice of States. While the expelling State enjoys under international law a fairly wide margin of appreciation as to its own interests or as to whether there is a threat to *ordre public*, the latter remains a 'general legal conception' open to impartial adjudication. State practice shows a certain uniformity as to the grounds for expulsion.

As to the manner and form of expulsion, it must be carried out in such a manner as not to violate the standards of international law for the treatment of aliens; otherwise the expelling State incurs international responsibility. Treaty obligations, such as those under the European Convention on Human Rights, in the light of the practice of the European Commission and under the Fourth Protocol to the Convention, go further. Within the European Economic Community the concept of *ordre public* is, according to the jurisprudence of the European Court, no longer to be judged solely in accordance with national criteria.

This is a scholarly work of undoubtable value. After Dr. Plender's *International Migration Law* (1972) this is the second book dealing with the international law aspect of the movement of persons, a subject hitherto neglected owing to the doctrine that admission and expulsion fall within the reserved domain. Dr. Goodwin-Gill deals with admission, exclusion and expulsion, Dr. Plender dealt mainly with immigration. The law of emigration, 'the right to leave every country including one's own', has so far mainly been treated by Mr. Inglès's 'Study of Discrimination in respect of the Right of Everyone to leave any Country, including his own, and to return to his Country' (U.N. Doc. E/CN.4/Sub.2/229 Rev. 1) (1964), prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and by a Colloquium held at Uppsala in 1972. This right which, unfortunately, is by no means granted by all States, also deserves closer examination. The draft 'Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they Live' prepared by Baroness Elles has been sent by the Sub-Commission to the Human Rights Commission. If finally adopted it may well be considered as declaratory of present international law on the subject of the position of aliens in the law of nations.

It is an interesting phenomenon that while the twentieth century has seen an unprecedented facilitation of transport, it is also a century of increasing legal restrictions on the

movement of persons, of emigration as well as of immigration. This is a challenging subject for the international lawyer and it is to be hoped that this meritorious work will lead to further discussion of this important subject.

PAUL WEIS

E.E.C. Immigration Law. By T. C. Hartley. Amsterdam: North-Holland Publishing Co., 1978. xxvi+335 pp. (including appendix and index). \$44.50; Dfl. 100.

In his concluding remarks, the author of *E.E.C. Immigration Law* observes that the introduction and implementation of the principle of free movement of labour 'does not . . . mean that there are no longer any obstacles to migration within the Community, only that the provisions of immigration law do not constitute a barrier of any significance as regards the economic objectives of the Treaty' (p. 279). Nevertheless, the preceding chapters of this work, in which the extensive provisions of E.E.C. law are stated and superimposed upon the immigration laws of the United Kingdom and the Netherlands, suggest that considerable technical difficulties of incorporation and harmonization do remain.

The author states as his aim the uniting of 'two legal disciplines', immigration law and Community law. He proceeds, however, subject to two self-imposed and serious limitations, declaring that he will be concerned only with legal issues and will be restricted to immigration law in the strict sense. The result is dry stuff, narrative statement and restatement of legal provisions and their likely effect, only infrequently embellished by discussion of or comment on the decisions of the European Court of Justice and national courts. In its plethora of questions and answers in response, the text suggests an oral origin, while its abundance of 'probably's' and expressions of hope offers little assurance to the practitioner or serious student of the subject-matter. And in a work on E.E.C. law, national and supra-national, it is disquieting to find so many references to English, rather than British or U.K., law, to English cases, English courts and English public policy (pp. 5, 15, 152, 159, for example).

The book is laid out in eight chapters and followed by a useful Appendix which brings together the texts of thirteen Community instruments concerned with free movement of labour. The Table of Contents presents a detailed sectional analysis which compensates for the otherwise inadequate index. The first chapter is devoted to introductory comments and is followed by two chapters illustrating the territorial and the personal scope of Community law provisions. 'Patriality' is wrongly ascribed (at page 68) to U.K. citizens whose grandparents were born in the U.K., and the five-year residency requirement for non-patrial U.K. citizens which conditions their participation in the free movement scheme is commended as a 'reasonable provision' by unqualified analogy with the residence requirement for the naturalization of aliens. Likewise, the U.K.'s Declaration on U.K. nationals made at the time of accession is described as 'entirely reasonable', despite the fact that, like the condition of patriality, it discriminates in practice against certain U.K. citizens who are not returnable to or who have no substantial connection with any country other than the United Kingdom. 'Reasonableness' (or the absence of its opposite) is in fact adduced throughout as argument or justification for rules of law or a manner of their interpretation which are, to say the least, controversial. Thus do the author's self-imposed limitations leave many substantial questions unanswered.

Chapter Four examines in detail 'Community immigration rights'—the right to enter, the right to reside, the right to remain. A narrative style is generally adopted, though not always accurately. Thus, at page 105, Article 1 of Directive 68/360 is said to speak merely of 'nationals of member States and their families'. In fact, the reference is to 'nationals of member States and their families to whom Regulation 1612/68 applies'. A small point, perhaps, but reference to that unmentioned source makes redundant much of the author's ensuing remarks.

The discussion in Chapter Five of the permissible grounds of derogation from the principle of free movement is more promising, although it is unfortunate that here, as

throughout the work, insufficient attention is paid to the norm of non-discrimination posited by Article 7 of the Treaty of Rome—a lacuna apparently due to that Article's being the subject of another book in the *European Studies in Law Series*. One might also quibble with the author's wholehearted adoption of the term 'public policy' to represent the continental notion of *ordre public*, particularly in view of the remarks of Advocate General Mayras in *Bonsignore v. Oberstadtdirektor, Köln*, [1975] 1 C.M.L.R. 472, and those of Advocate General Warner in *Reg. v. Bouchereau*, [1977] 2 C.M.L.R. 800. These points apart, however, the author argues strongly against the refusal of the European Court of Justice to uphold limitations on internal free movement in the *Rutili* case; and he canvasses the broadest interpretation and application of special regimes for foreigners on the basis that 'the public policy proviso must—almost by its very nature—be discriminatory in its operation'. The notion that, within the E.E.C., *ordre public* is a Community concept, allowing but also limiting the exercise of discretion by member States, receives no attention; likewise, no acknowledgement is accorded to the argument that measures of exclusion and expulsion constitute *exceptional* measures in derogation of the fundamental principles of non-discrimination and free movement of labour.

The author concludes with two chapters on Community rights in the laws of, respectively, the United Kingdom and the Netherlands. He observes that Community provisions 'are not fully implemented in the United Kingdom', that they 'are probably better implemented in the Netherlands', although there too a number of 'shortcomings' exist. Looking to the future, the author anticipates the possibility of still greater freedom of movement; one corollary, however, would be the need to make it easier to bring fugitive criminals to justice—'abolishing, for example, the restriction relating to crimes committed for political objectives' (p. 283). Although the provisions of Community law are, on the whole, competently set out, there can be little doubt that a better book would have resulted had the author not adhered to his self-imposed limitations.

GUY S. GOODWIN-GILL

Les Réserves aux traités multilatéraux: Évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de justice le 28 mai 1951. By PIERRE-HENRI IMBERT. *Publications de la revue générale de droit international public*, No. 31. Paris: Éditions A. Pedone, 1979. 479 pp. (plus annexes, bibliographies and tables).

The admissibility of reservations, and their effects, are among the most controversial of the questions arising within the law of treaties. It is true that at the Vienna Conference delegates adopted the International Law Commission's proposals on the subject without substantial amendment or opposition. The ensuing articles in the Vienna Convention have, however, not escaped critical or even sceptical comment; nor are they entirely comprehensive, since they fail to deal directly with the effects of reservations that are prohibited expressly or impliedly or on the ground that they are contrary to the treaty's object and purpose. In these circumstances the editorial committee of the *Annuaire français* was amply justified in concluding that the legal community stood in need of a thorough and practical treatise on reservations. Only the formidable nature of the subject can account for the fact that no such work has been published for a generation, the last being Kaye Holloway's monograph which appeared in 1951.

M. Imbert's book fills the lacuna admirably. It is divided into three parts. The first deals with questions of admissibility. It describes in historical terms the abandonment of the unanimity rule, recounting examples of States' practice before the Second World War and examining the effect of two new elements: the appearance of international organizations and the presentation of the advisory opinion of the International Court of Justice in the *Case Concerning Reservations to the Genocide Convention*. It then renders an account of

the current law, examining meticulously the relevant provisions of the Vienna Convention, tabulating and classifying reservations to a wide range of modern international conventions. The second part of the book has as its subject the legal and practical consequences of reservations. Throughout this part the author employs the technique, which he had begun to use earlier, of supplying and analysing examples drawn from the diverse practice of States. The third and final part draws conclusions from the antecedent pages. The thesis is that reservations no longer tend to fulfil the objects for which they existed before the Second World War, since multilateral treaties themselves are now employed for new purposes, particularly when concluded under the auspices of international organizations and open to ratification by States more numerous and diverse in interests than those that belonged to the League.

The argument is presented emphatically. In the author's view, the use of reservations has been open to widespread criticism on the ground of strict law, but the legal point of view is apt to eclipse political considerations or to obscure the fact that treaties are not merely texts embodying agreements but frameworks within which the contracting parties conduct their mutual relations for more or less protracted periods. Writing as a member of the secretariat of the Council of Europe, he observes that those engaged in drafting multilateral treaties are commonly presented with a choice: they can include a controversial provision within the text of a convention, in the knowledge that certain of the contracting parties will exclude their liability under the article by means of reservations; or they can devise a separate protocol to deal with the same question. The second of these devices, although more orderly for the draftsman, is often the less satisfactory of the two, since States may find it easier to leave a protocol unratified than to make a reservation to an article. The Vienna Convention affords an example in Article 66, which provides for the submission of certain disputes to the International Court of Justice. Five States have entered reservations to that article; but by inference we are invited to ask how many would have accepted the limited commitment embodied in Article 66 if it had been contained instead in a separate protocol.

The position taken by M. Imbert is not unconventional. Although the opinion of the majority in the *Genocide* case has formidable opponents, not the least of them being Professor Schwarzenberger, few modern writers go so far as to contend that each reservation requires the unanimous assent of the other contracting parties, and few in the west espouse the view that there exists an unlimited right to make reservations. The merit of this book lies not in the novelty of its thesis but in the care and detail with which it is expressed. For the present reviewer, and no doubt for many readers, its principal interest lies in the sections devoted to an analysis of the modern practice of States, manifested in reservation clauses in multilateral conventions. If the style is occasionally dense, and contains references to the numbers of articles of little-known treaties, without a description of their content, this may readily be overlooked, since M. Imbert has achieved at the expense of those inconveniences the compression of a great deal of factual information within a book of manageable size.

RICHARD PLENDER

The Law of the Sea and Australian Off-Shore Areas. By R. D. LUMB. 2nd edition. Brisbane: University of Queensland Press, 1978. 151 pp. (plus appendix). £12.50.

Australia is one of the world's largest coastal States, with established inshore fisheries, pearl and oyster fisheries and an extensive, natural continental shelf. Her interests as a naval power and a trading nation include freedom of transit through straits, and through the waters claimed by archipelagic States, principally Indonesia and the Philippines. Dr. Lumb, of the University of Queensland, has recorded and analysed the impact of the changing international law of the sea upon Australian interests, and the responses by federal and State legislatures.

This second edition of his work, completed in September 1977, gives considerable attention to the resolution of the constitutional conflict between the Commonwealth and the States in relation to sovereign rights and jurisdiction over the adjacent sea and sea-bed. The High Court decided by a majority in 1975 in favour of the Commonwealth claim and upheld the validity of the Seas and Submerged Lands Act of 1973. The main features of the Act are sketched in Chapter 6, the first chapter in Part II, which is devoted to the position under the Australian constitutional structure. Part I comprises a survey of the position in international law, intended possibly for municipal lawyers or students with minimal knowledge of international law, and already showing a rather dated air in the pages dealing with exclusive fishery zones and the E.E.Z. It would have been more accurate, even in 1977, to preface an account of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas with a warning that this Convention has had very little practical effect. The reader is not told this until after the summary of the Convention's main provisions. However, anyone who expounds the general international law of the sea at the present time risks giving such hostages to fortune. Part I can still serve as a useful introduction for the uninitiated, provided that it is read with awareness of likely changes in law and practice.

The substantive chapters of Part II deal with the position of the various sea or sea-bed areas in Australian law, both federal and State. Comparisons are drawn with the legislation and litigation in the U.S.A. and Canada in the discussion of the Seas and Submerged Lands Act and the 1975 Australian High Court judgment. The Australian Act leaves intact the legislative jurisdiction of the States over persons, things and events on the territorial sea except in so far as State law purports to vest or to exercise any sovereignty or sovereign rights in this area. If the State law has a sufficient nexus with the State to make it a law for the peace, order and good government of the State, and if it does not infringe on Commonwealth sovereignty as declared in the Seas and Submerged Lands Act, then it is valid legislation subject to any argument that it violates other Commonwealth legislation applying to the area which has paramountcy under the Commonwealth Constitution. Dr. Lumb summarizes the legislation applying in Australian off-shore waters, on such subjects as fishing, mining, conservation of the environment, and navigation. He states the principles governing exercise of civil and criminal jurisdiction by the High Court and by State courts, and draws attention to some unsatisfactory features of the present position concerning crime on the high seas (pp. 138-45). The text of the Seas and Submerged Lands Act is given in an Appendix, and the footnote references enable further research to be pursued into particular problems of Australian maritime jurisdiction and her off-shore areas and resources. In sum, this is a useful *tour d'horizon* which will retain considerable value even when (if) a new Law of the Sea Convention is adopted.

GILLIAN WHITE

Essays on International Law and Relations in Honour of A. J. P. Tammes. Edited by H. MEIJERS and E. W. VIERDAG. Leyden: A. W. Sijthoff, 1977. viii+371 pp. Dfl. 65.00; \$26.00.

Professor Tammes is perhaps less well known among international lawyers outside his native Netherlands than some of his compatriots. This may be attributed to the fact that the greater part of his published work has appeared in non-English publications. To the outsider, the most fascinating feature—and possibly one that is unique amongst the ranks of professors of international law—of a distinguished career, is the long period he served as foreign editor of the leading Dutch newspaper, *Nieuwe Rotterdamse Courant*, prior to taking up the Chair of International Law and Relations at Amsterdam University in 1947. During the next thirty years he served from time to time as a member of the Netherlands delegation to several international organizations and was a member of

the International Law Commission in 1967 and of the Permanent Court of Arbitration in 1966.

The twenty-two essays presented in this volume previously appeared as a special double issue of the *Netherlands International Law Review*. The length of the essays—all written in English—varies from ten to twenty-eight pages. The contributors mainly come from the Netherlands, and are either academics or members of the government service. The editors point out that they have chosen no one central theme for the collection. Only one essay falls strictly into the category of international relations. Although given an international law setting, three are primarily philosophical in tone. They embrace the notion of effectiveness; the principles of rational organization as applied in the process of law; and the relationship between international law and municipal law and fundamental rights. Areas which receive the attention of more than one contributor include the International Labour Organization; self-determination; and the laws of war. A number of essays re-examine topics which fall into the mainstream of contemporary juristic writing on international law: human rights; the prohibition of the use of force; civil war and intervention; and the concept of acquired rights. Two of these essays stand out. Professor Röling's analysis of post-1945 developments in the use of force, particularly as shown by the practice of the Security Council, is linked to the issues of arms control and disarmament, a vital perspective that is normally ignored by legal writing on the subject. Mr. Van Boven breaks away from the all too familiar descriptive accounts of international machinery for the promotion and protection of human rights and offers some refreshing new insights into the role of individuals, groups and non-governmental organizations in this problematic area.

The remaining essays cater for more specialized interests and include: inter-secretariat co-ordination in the United Nations system; international propaganda; and the Dutch-German treaty regime for borderlands. The best of the more specialized essays is a closely argued piece by Professor Schermers, who considers, with reference to the jurisprudence of the European Court of Justice, how far the concept of direct effect in Community law both does and should operate to impose *obligations*—as opposed to rights—on individuals, either as a consequence of particular rights granted to others, or as a consequence of particular obligations imposed on others.

Needless to say, even readers with the most catholic interests in international law are likely to find parts of this *mélange* too daunting. If the quality of the contributions is variable, there remains enough in the collection that is original to make it worthy of recommendation. Long may the Dutch tradition in international law continue to flourish.

J. C. WOODLIFFE

Torts in Private International Law. By C. G. J. MORSE. *Problems in Private International Law* (General Editor, R. H. Graveson), Vol. 2. Amsterdam, New York, Oxford: North-Holland Publishing Co., 1978. xxiii+411 pp. \$49; Dfl. 110.

This is the most comprehensive monograph on torts in private international law ever to have appeared in this country. It is a penetrating work of great erudition which gives to the reader a conspectus of the conflicts problems arising from delictual liability as they present themselves at the moment, especially in the United Kingdom, in Australia, in Canada and in the United States. French and, to a smaller extent, German material is also considered, and in the very valuable fourth and concluding part of the book the author deals with the unification of the private international law of tort, i.e. with the Canadian Draft Foreign Torts Act of 1966, with the (now defunct) clauses on tort liability in the Draft E.E.C. Convention on the Law applicable to Obligations, with the Edinburgh Resolution of the Institute of International Law on the subject (1969), with

(above all) the two Hague Conventions on Traffic Accidents and on Products Liability, and also with a choice of law rule proposed in 1977 by the P.I.L. Committee of the Civil Code Revision Office in Quebec. These texts give the author an opportunity for some very thoughtful observations on the pitfalls of 'premature unification' and on the need for the prudent gradualistic technique of the Hague Conventions.

The book thus concludes on a note of practical wisdom, but also on one of regretful resignation, and this is not surprising, because the bulk of the work is inevitably concentrated on the erratic, obscure, haphazard and—to some extent—ephemeral phenomena of the case law developed in the English-speaking countries and on the comments they have evoked from academic writers. It is not the fault of the author that one lays his book down with a feeling of frustration and dissatisfaction—a feeling obviously shared by the author himself. He only did his duty in faithfully reporting and deploring (pp. 288, 295)—and also in showing the potential dire results of the fact—that the House of Lords saw fit in 1971 (*Boys v. Chaplin*, [1971] A.C. 356) to reaffirm a rule thoroughly inimical to international harmony and conducive to severe injustice laid down more than a century ago by a judge who obviously had no conception of the general significance of what he was doing (*The Halley*, (1868) L.R. 2 P.C. 193). And the author did perhaps more than his duty in delving into the American case law on motor accidents which, owing to the influence of doctrines such as those propounded by the late Professor Brainerd Currie, has now become hopelessly confused, chaotic, unpredictable, and—despite all laudable efforts to explain it—incomprehensible. If anyone anywhere in the world should be looking for telling arguments against the principle of precedent and against judge-made law altogether, let him study the English, the Scottish, the Canadian, but above all the American cases on this matter.

This is not the impression which the author of this work sought to create. He obviously tried his best to avoid it, and to present the subject in an orderly, well-considered, systematic fashion. And as far as the laws of England, of Scotland and of other countries of the Commonwealth are concerned, this effort was not altogether unsuccessful. He even succeeds in producing a rational analysis, i.e. a *ratio decidendi* analysis, of the decision (as distinct from the judicial utterances) in *Boys v. Chaplin*, though their Lordships did not make his task exactly easy. But his valiant and almost heroic attempt to give an intelligible picture of the recent American tergiversations in this matter just does not come off. There are limits to what even the most industrious, conscientious and well-meaning author can do in producing order out of chaos. Whether he intended it or not, his *concordantia discordantium* turned into a *reductio ad absurdum*. Though he sometimes falls into the jargon of 'interest' analysis himself, there are clear indications in many places that he views it with the scepticism it deserves. Did he by any chance take that which he calls a different way of 'thinking about legal problems' (p. 322) a trifle too seriously? How much of this fashion will remain in a few years when it has been displaced by another? And is it not in this context relevant that all this is grotesquely occasioned by two or three issues arising from differences in the details of State legislation (guest liability, financial limits of fatal accidents claims, etc.), the effect of which on inter-State transport Congress could remove by one stroke of the federal legislative pen, if it chose to do so? Has there ever been such a case of a mouse giving birth to a mountain?

The presentation of the subject in this work deserves nothing but praise. The book consists of four parts, the first of which is historical and deals with the early developments of the *lex fori* and *lex loci delicti* doctrines. The second and third parts bear the titles 'The Operation of the Traditional Rules for Choice of Law in Tort' and 'New Developments', and the contrast between these two headings shows the significance the author attributes to contemporary developments on both sides of the Atlantic. The fourth and last part, as already indicated, is a discussion of the problem of unification.

That which the author calls the 'traditional' rules is, of course, in all parts of the Commonwealth the twin rule in *Phillips v. Eyre*, [1870] L.R. 6 Q.B. 1, and in the United

States the doctrine of the *lex loci delicti* in all its dogmatic rigour as formulated by Beale in the *First Restatement*. The most important and a very welcome aspect of the discussion of the traditional British rule is the unambiguous statement that *Machado v. Fontes*, [1897] 2 Q.B. 231, was clearly overruled by the House of Lords in *Boys v. Chaplin*—one of the few unquestionable *rationes decidendi* of that case. This applies to both aspects of *Machado v. Fontes* (the liability aspect and the 'heads of damages' aspect) which the author could perhaps with advantage have more clearly kept apart. In the light of this insight he proceeds in subsequent chapters to analyse the foundations, the operation, the limitations of, and the policy supporting, the *lex loci delicti* rule, and devotes a special chapter to the definition of the *locus delicti*. He then examines the various issues (standard of liability, identification of the claimant and the person liable, burden of proof, defences and 'remedies') and the selection of the rules which govern them. The difficult question of the victim's direct action against the tortfeasor's insurer he deals with (pp. 163 ff.) as an issue concerning the selection of the 'proper defendant', which—the reviewer is now convinced—is the right way of handling it, even if, as the reviewer does and the author is inclined to do, one characterizes the right against the insurer as a contractual right governed by the proper law of the insurance contract. These pages on the direct action are particularly good, and one could have wished that the author had made his awareness of the dominating fact of insurance more articulate throughout his work.

This is especially true of the third part where (Chapter 9) he explains 'American Developments in Choice of Law in Tort'. Neither Currie's nor Professor Leflar's nor Chief Judge Fuld's approaches would have been possible if in most of what they wrote the word 'defendant' had not been a covering word for 'the insurance company'. This applies also and especially to Professor Cavers's 'rules of preference' to which the author with good reason pays special attention. These rules express a legitimate tendency to favour the tort victim against the tortfeasor's insurer. One wonders whether the time has not arrived to drop the rather disingenuous references to individual motorists and manufacturers when discussing tort problems in municipal or conflicts law, and to present these problems as what they are: questions on tracing the limits within which insurers have to discharge their responsibilities to the public. This of course applies only to transport and producers' liability, but these cover almost the entire field of controversy, in America as well as in Europe.

That they do is not only clear from the chapter on the new American developments, but also from the second chapter in the third part. Here the author presents a thorough-going analysis of *Boys v. Chaplin* and of its aftermath in the United Kingdom, in Australia and in Canada. In a particularly felicitous and useful part of his work he introduces a series of variations on the facts of the case, to show how they would have to be handled in the light of what he understands to be the effect of the decision. This effect broadly coincides with the reformulation of the relevant 'Rule' in Dicey and Morris, *Conflict of Laws*, which the author accepts as an attempt to distil out of five divergent judicial opinions the 'quintessence' of the English conflicts rule on torts as it emerged from the case.

There are many other outstandingly good passages in this work, among which the reviewer would single out the analysis of the particularly difficult problem of 'contractual defences to tortious claims' (pp. 187 ff.) and the convincing demonstration that *Sayers v. International Drilling Co.*, [1971] 1 W.L.R. 1176, was wrongly decided (though the reviewer confesses his inability to understand how (p. 190) the place of accident can affect the proper law of the contract).

As we all do, the author refers to the 'quantification' of damages without saying what this really means; the reviewer does not pretend that he could have done better. But apart from this, it may be a good idea in the next edition to look critically at pp. 204 ff. because the treatment of collateral benefits and especially of the crucial issue of tax deductions from damages for loss of earning capacity is somewhat inadequate compared with the thoroughness bestowed on other matters. The interesting discussion of the 'currency of an award' (pp. 206 ff.) is out of date because we now have the decision of the House of

Lords in *The Despina R.*, [1978] 3 W.L.R. 804. That decision presupposes—as does the author's analysis of the problem—that the choice of the currency in which delictual damages are to be assessed is governed by English law. But is this true if the tort is governed by a foreign law, e.g. if a collision at sea occurred in foreign territorial waters, and the foreign law is in its choice of currency more favourable to the defendant than the *lex fori*? This question did not arise in *The Despina R.* nor has it as yet arisen in any other reported case.

This is, in sum, a very valuable book which, one hopes and expects, will be kept up to date and go through many future editions. In the next edition Mr. Morse may even persuade the printer at p. 142 line 7 to make a dependant out of the defendant. That the publishers will abandon the irritating habit of printing the footnotes at the end of the chapters instead of the bottom of the pages is probably beyond the range of possibility.

OTTO KAHN-FREUND

Fontes Juris Gentium: Decisions of German Courts relating to Public International Law, 1961–1965. Edited by HERMANN MOSLER and RUDOLF BERNHARDT. Berlin, Heidelberg, New York: Springer Verlag, 1978. xxii+1048 pp. DM. 298.

This volume of a well-established series collects 254 decisions rendered by German courts during 1961 to 1965. It follows the familiar pattern of printing in the first part the headnote of each case in German, English and French and reproducing in the second part the full text of the decision in the German language. There is also an index in all three languages. As, most unfortunately, the *International Law Reports* have suffered substantial interruptions, the first part of this book is a small and very limited substitute which the English-speaking student can use. It will help to a certain extent in filling a glaring gap that, fortunately, is now being rapidly filled, but for some years had rendered it almost impossible to do reliable work in most fields of public international law, unless one was not only a linguist, but also had access to foreign reports. Who in the English-speaking world can fulfil both requirements?

This is not to say that the full text of all the 254 decisions ought to be available in English or would have been available had the *International Law Reports* appeared punctually. In many cases it is doubtful whether the decisions were worth reporting. Some were rendered by courts of little or no authority. Others were subsequently reversed or affirmed by higher courts and are therefore obsolete. It must also be said that in many instances the facts are insufficiently summarized. Another oddity is that invariably one source only is indicated. If the editors followed the practice of their colleagues who are responsible for the annual collections of decisions on private international law published by the sister Institute in Hamburg, some technical aspects of reporting would perhaps be improved. Variations in type might be considered. Additional indexes would be helpful. References to earlier cases as published in this series would make much difference. Nevertheless the present book is a very valuable tool which will be welcomed, though only scholars who read German can make full use of it.

F. A. MANN

Fontes Juris Gentium: Decisions of German Courts relating to Public International Law, 1966–1970. Edited by HERMANN MOSLER and RUDOLF BERNHARDT. Berlin, Heidelberg, New York: Springer Verlag, 1979. xxi+580 pp. DM. 196.

The most recent volume of decisions of German courts relating to public international law covers the years 1966 to 1970. Translation into English and French is now limited to

a minimum in that the headnotes reproduced in the first part are followed by a few general words in English and French indicating in the broadest terms the points covered by the decision—for instance, ‘recognition of foreign judgement—observation of fundamental rules of procedure’ (No. 52) or ‘responsibility of States in case of reduced sovereignty’ (No. 4).

One of the most remarkable decisions (No. 115) is described by the words: ‘London Agreement on German External Debts—individual claims’. It is a decision of the Federal Administrative Court of 12 June 1970 which, it must be admitted, is in line with several decisions of the Federal Supreme Court. Art. 5 of the London Debt Settlement Agreement of 1953 defers reparation claims until the conclusion of a treaty of peace. Individual claims for damages cannot therefore at present be prosecuted, in fact they are most unlikely ever to be capable of enforcement. One would have thought that the exclusion, just as the treaty as a whole, would apply only to the nationals of States which have ratified or acceded to the treaty. Poland has not done so. Yet the German courts have denied any remedy to Polish citizens:

Art. 5 of the treaty having been incorporated into German law no longer has any contractual character. It lost this as a result of incorporation, for the statutes of a State (which are founded, not upon the consensus of contracting parties, but upon the unilateral command of the law-giver) apply *inter omnes*.

The present writer has criticized this surprising practice which is largely unknown outside Germany, but clearly merits attention: *Jahrbuch für öffentliches Recht*, 18 (1975), 373, at p. 383. It is a pity that the present volume does so little to make that practice accessible to foreign readers. Many examples of similar omissions could be given. It may be that they were unavoidable. One does not wish to be too severe where expense and pressure of time have called for restraint. But a word of regret may be permitted. German judicial practice is unusually rich as regards points of public international law. That wealth remains hidden if non-German readers are not made aware of it.

F. A. MANN

The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland. By P. M. NORTH. Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977. xxiv+466 pages. \$44.95; Dfl. 110.

In this book Dr. North, who is well known to readers of the *Year Book* as the editor of Cheshire and North’s *Private International Law*, examines the rules of private international law applicable to matrimonial causes not only in the three United Kingdom jurisdictions of England and Wales, Scotland and Northern Ireland, but also in the three smaller British jurisdictions of the Isle of Man, Jersey and Guernsey, as well as in the Republic of Ireland. This is an ambitious project, not only because of the number and diversity of the legal systems covered, but also because of the complexity of the subject within each system. The fact that the author is a member of the Law Commission, and so in a strong position to influence reform of the law of England and Wales, gives the book additional interest.

With so much ground to cover, the decision as to the method of presentation must have been a difficult one. The method adopted has been to divide the book into three parts, the first part being a short introductory section containing a useful description of some of the more important connecting factors relevant to the subject, the second part dealing as a whole with all three jurisdictions within the United Kingdom, and the third part dealing separately with the four remaining jurisdictions. In relation to all seven legal systems, questions of jurisdiction, choice of law and recognition of foreign decrees are treated by turn in relation to each matrimonial cause. This method of presentation necessarily

involves extensive cross-referencing and a degree of repetition, but the end result is a remarkably clear exposition of a difficult and sometimes confusing subject.

As a result of the Recognition of Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973 (reproduced as appendices to the book), there are now sufficient similarities between the rules of private international law applicable to matrimonial causes within all three jurisdictions of the United Kingdom to justify their treatment together. The discussion of the rules applicable within the United Kingdom in fact takes up more than two-thirds of the book. Dr. North has already written extensively on this subject in relation to the law of England and Wales, but the book has given him an ideal opportunity to develop his views further, and he has seized it with relish. He tackles problems, analyses ambiguities and highlights anomalies with such gusto that every reader must be filled with admiration for his determination to face up to each and every difficulty of the subject, shirking none, and applying to all a powerful, if sometimes tortuous, method of reasoning. Every point which has occurred to him, whether major or minor, real or insubstantial, is discussed in full, and, on the whole, convincingly. If, indeed, there can be any criticism of the method of treatment of the complexities of the subject, it is perhaps, that the author sometimes seems to be thinking up problems just for the sake of them, as, for example, where he discusses a possible uncertainty arising from a peculiarity in the wording of the provisions of the Domicile and Matrimonial Proceedings Act 1973 relating to proceedings for presumption of death and dissolution of marriage, when the meaning of the provisions is really quite plain, and, indeed, is the very meaning at which Dr. North eventually arrives at the end of his discussion.

Following the enactment of the recent legislation referred to above, the rules relating to jurisdiction over matrimonial causes within the United Kingdom, whether one likes them or not, are now fairly straightforward, and there is relatively little controversy to be extracted from them. The rules governing the jurisdiction of the English court to grant declarations as to marital status, on the other hand, have not yet been codified, and they are so complicated and uncertain that even the most experienced practitioners in this field have been known to fall foul of them. The commentary upon this topic, particularly the treatment of the vexed question of the relationship between the statutory jurisdiction to grant a declaration of status (originally conferred by the Legitimacy Declaration Act 1858 and now contained in section 45 of the Matrimonial Causes Act 1973) and the jurisdiction under Order 15, Rule 16 of the Rules of the Supreme Court, is a quite invaluable guide through this minefield. The discussion of the Law Commission's provisional proposals for reform of the law of declaratory relief, which are welcomed generally, subject to a number of criticisms of detail some (but not all) of which seem convincing, has particular piquancy in view of the author's present office.

In the realm of choice of law, the most difficult area in the English conflict of laws relating to matrimonial causes is without doubt that concerned with nullity of marriage. Some of the problems here, particularly those connected with the annulment of voidable marriages, appear to be well-nigh insoluble in the present state of the law, and Dr. North is to be congratulated on a valiant attempt to put the law in this area into some sort of order, even if in the opinion of this reviewer he has not altogether succeeded. His suggestion that in principle the question of physical capacity (impotence and wilful refusal) ought to be governed by the law of the antenuptial domicile of the spouse alleged to be incapable is superficially attractive, because it aligns the choice of law rules relating to physical capacity with those applicable to legal capacity, but it produces injustice where a spouse has a right under the law of his or her antenuptial domicile to petition for nullity on the grounds of the other party's incapacity. A better solution would surely be to submit the question to the law of the antenuptial domicile of the spouse claiming to have the marriage annulled, whether or not on the ground of that spouse's incapacity. There is, indeed, an argument for going a step further than this, in the interests of mutuality between the spouses, and treating the marriage as voidable if it is voidable at the instance of the party

seeking nullity under the law of either party's antenuptial domicile. This would avoid a situation arising in which one spouse would have the option of having the marriage annulled on the ground of physical incapacity but the other would not, merely because they happened to have had different domiciles at the date of their marriage.

Perhaps the most difficult question of all in this area is whether a court in the United Kingdom should be prepared to annul a marriage on a ground which under the *lex domicilii* renders it voidable but which is unknown to the law of the *forum*. In his *Conflict of Laws*, Dr. Morris observes that 'these are very deep waters', and he advises against further speculation, but, undeterred, Dr. North has taken the plunge. He suggests that the answer to the question is that the court should annul the marriage. This is a dangerous suggestion, because it would introduce revolution by the back door. In his Hague lectures, 'General Problems of Private International Law', Professor Kahn-Freund has rightly pointed out that 'it is . . . one of the keys to the understanding of the conflict of laws principles adopted in common law countries that by these principles foreign law can never give a judge the power to take formative judicial action'. To allow a court of the United Kingdom to change the status of parties to a marriage because the marriage is voidable on a ground unknown to English law would, in the reviewer's opinion, be contrary to the principles upon which the courts of the United Kingdom have hitherto always acted in applying choice of law rules to matrimonial causes.

Whereas the recent statutory reforms of the rules of jurisdiction over matrimonial causes in the United Kingdom have created few real difficulties, the same cannot be said of the recent changes in the United Kingdom rules for the recognition of foreign divorces and legal separations. These have created a whole host of difficult problems of statutory interpretation. Dr. North weaves his way through the complexities of the Recognition of Divorces and Legal Separations Act 1971 with consummate skill, and his discussion of the effect of the Act on the recognition of extra-judicial divorces, which substantially reproduces his earlier article on the subject in the *Law Quarterly Review*, is outstanding. The only criticism which the reviewer would make of the treatment of the United Kingdom rules for the recognition of foreign decrees generally is that the author is rather too much a 'recognition man': he tends to favour recognition wherever possible, despite the serious consequences which, in the present state of United Kingdom law, this may have upon a spouse's prospects of obtaining financial relief in the courts of the United Kingdom, and despite the problem (fully discussed in the book) of reconciling wide recognition rules with narrow choice of law rules governing the parties' capacity to remarry. This inclination towards recognition is particularly noticeable in the chapter on foreign nullity decrees, where the recent judicial extension of *Indyka v. Indyka* to nullity decrees is viewed with apparent equanimity. It is high time that steps were taken by the English and Scottish Law Commissions to replace the present uncertainty surrounding recognition of foreign nullity decrees with a set of simple rational and convenient rules, and Dr. North is well placed for the purpose.

Although this review has concentrated upon the discussion of the rules of private international law in the United Kingdom (which is really the only part of the book on which the reviewer feels competent to comment), it should be said that the discussion of the rules applicable in the four other jurisdictions covered by the remainder of the book is clear and interesting, though less full than the discussion of the United Kingdom rules. So far as the private international law of Jersey, Guernsey and the Isle of Man is concerned, Dr. North's book seems to be breaking new ground, as there are no other works on the subject. All in all, this is a very useful and stimulating book, packed with information and ideas, and it makes a valuable contribution to the study of the conflict of laws in the British Isles and the Republic of Ireland.

I. G. F. KARSTEN

The Arab Oil Weapon. Edited by J. J. PAUST and A. P. BLAUSTEIN. Dobbs Ferry, New York: Oceana Publications; Leyden: A. W. Sijthoff, 1977. vii+370 pp. \$30; Dfl. 72.

In October and November 1973 the Arab oil-producing States simultaneously raised the price of oil, cut back production and imposed an embargo on the United States and other supporters of Israel. The present volume brings together a variety of documents with a bearing on these actions and a number of essays on their legal and political implications.

The documents include a historical chronology of the crisis, several O.P.E.C. Resolutions and Congressional Reports and a well-chosen selection of treaties and General Assembly Declarations. The essays, all of which have been published elsewhere, include contributions from leading legal and political commentators and are in two groups.

The first group deals with the embargo. It includes a short paper by Ambassador Amuzegar examining the reasons for the rise of O.P.E.C. and the editors' title essay. The latter, which was first published in the *American Journal of International Law*, is a policy-oriented examination of the embargo and provides a good illustration of both the strengths and limitations of this method of analysis. A wide-ranging survey of the issues of legal policy raised by the question of economic coercion is combined with a valuable discussion of how and why the threats and actions of the oil-producing States can be argued to contravene such policies. Missing, however, is a close analysis of the *lex lata* in the form of a study of the background of Article 2 (4) of the Charter, or a survey of the use of economic coercion in State practice.

Not surprisingly, Dr. Shihata's reply to the editors' paper, which is also reprinted here, takes up these points. His defence of the oil embargo is, however, also open to criticism. To argue that Israel is under a legal duty to return the territories occupied in the 1967 war is one thing; to suggest that this somehow enables the oil embargo to be legally justified is another and requires a more convincing argument than is presented here. In a short reply to Dr. Shihata the editors underline some of the weaknesses in his paper and further explain their conception of relevant legal policies.

In the next paper Professor Lillich discusses the general question of the legality of economic coercion and, following Dr. Bowett, sketches an approach to the issue based on the intent, rather than the effect of the actions in question. He also points out that the refusal of the United States and its allies to challenge the legality of the embargo is as poor a reflection on their political judgement as on their support for international law.

The significance, or insignificance, of law in this area is clearly one of the key issues raised by the embargo. It forms the theme of a penetrating paper by Timothy Stanley, who argues that both the oil embargo and recent expropriations of alien property can be interpreted as a rejection of the concept of legal and moral restraints on the use of power. Whether the implications of this regression have been fully appreciated by its perpetrators is, the author suggests, open to question. For, as he explains,

If we are playing an international poker game for virtually unlimited stakes, it seems entirely reasonable to ask why the rules allow the 'one-eyed jacks' of oil, bauxite, or other resources to be 'wild', while the traditional 'aces' of military and political-economic power are unplayable (p. 166).

The possibility of a military response to the embargo dominates the second section of the book, which is concerned with the reaction of the United States. Brief Presidential statements appearing to rule out the use of force are followed by an address by Dr. Kissinger proposing various arrangements for conservation and co-operation and papers by the Congressional Research Service examining the feasibility of United States military action, or a food embargo. Both forms of sanctions are found to be impracticable, the former because of the difficulties of seizing the installations intact and the possibility of Soviet intervention, the latter because of the insubstantial nature of the threat.

The military option is also regarded sceptically in a short but lively essay by Andrew Tobias. Very different, however, is a trenchant contribution from Professor Tucker, in which he suggests that the issues raised by the oil embargo require the military option to be given the most serious consideration. Believing that the technical problems of repairing damaged facilities can be exaggerated, Tucker argues that Soviet intervention can probably also be discounted.

Although the majority of essays in this collection are concerned with either the legal or the politico-military aspects of the oil embargo, wider issues are not ignored. Tobias, Kissinger and Lillich all see the price, as well as the availability, of oil as an issue of major importance and the final paper by Professor Jackson discusses the economic and financial implications of commodity pricing with particular reference to the United States Trade Act of 1974.

It is a pity that this last theme, which is clearly inseparable from the issue of both the embargo and the question of economic coercion generally, could not have been more fully developed. As it stands, however, this volume provides an excellent introduction to a series of legal, political and economic problems as pressing today as in the aftermath of the October War.

J. G. MERRILLS

The Advisory Function of the International Court in the League and U.N. Eras.
By MICHA POMERANCE. Baltimore: Johns Hopkins University Press, 1973.
380 pp. (plus appendices). £8.35.

Although this review appears several years after the publication of Dr. Pomerance's book, the book itself is in no sense out of date. It would find a place in any collection of literature on the Court, alongside works by Rosenne, Keith, Lauterpacht, Verzijl, and the richly stimulating symposium on the *Judicial Settlement of International Disputes* published in 1974 by the Max Planck Institute. Dr. Pomerance set herself the task of comparing the use made of the advisory function of the Court in the League period with that in the U.N. period up to the *Namibia* opinion. Since the completion of her work, the Court has given two more advisory opinions, acting as a court of review from the U.N. Administrative Tribunal in *Application for Review of Judgment No. 158* (opinion delivered in 1973), and the important opinion concerning self-determination, territorial sovereignty and other 'legal ties' between States and territory, in the *Western Sahara* case (1975). Perhaps we can hope that Dr. Pomerance will offer an analysis of the request for and the reception of the Court's opinion in the latter case, for comment on it to date has concentrated, quite properly, on the substantive legal and political issues of territorial claims, self-determination and decolonization (see in particular Thomas M. Franck's article in *American Journal of International Law*, 70 (1976)).

Dr. Pomerance has taken 'the vantage point . . . of the organization' for her study, rather than looking at the advisory jurisdiction from the perspective of the Court. The advisory function is regarded as a problem-solving tool, and the author is concerned with its use or non-use for such ends and with the degree of 'success' achieved by the opinions. The study thus combines legal, political and, in a sense, historical, analysis. Dr. Pomerance unpicks the webs of expressed reasons, unstated motives and fears, and barely concealed assumptions about the international judicial process and the Court's relationship to the two major international organizations which surround the pre-request and post-opinion phases of the opinions of the P.C.I.J. and the I.C.J. The book contains ample material for any diplomat or legal adviser searching for arguments to support a proposal to seek, or to refrain from seeking, the Court's opinion in any given disputed situation. The searcher will also find guidance on considerations affecting the drafting of requests and, almost equally important, the drafting of the 'reception' resolution of the organ to which the opinion is rendered.

The author demonstrates that in the League era the Court's advisory jurisdiction was used frequently to clarify legal matters in doubt or dispute, many arising from the peace settlement. But once that settlement began to collapse, 'political' solutions were preferred to legal and the P.C.I.J. gave its last advisory opinion in 1935. In the very different international society which has been reflected in the U.N. since 1945, all issues tend to become politicized, and there is reluctance on the part of the Security Council and the General Assembly to allow the Court any part in 'problem-solving' or decision-making. The Court's advisory jurisdiction has been used less frequently, and its opinions have been received as an element in a continuing controversy more often than as resolving the major points in issue. However, in some instances the requesting organ was able to implement the opinion effectively, by a majority vote or because of the acquiescence of States directly concerned, e.g. the *Reparation, Administrative Tribunal, Reservations, I.M.C.O.* and *U.N.E.S.C.O.* cases. Dr. Pomerance offers a full account of the contexts of the opinions and, a valuable contribution, makes case studies of many of the requests in the League period and all of those in the U.N. period, including 'stillborn' requests—proposals that the Court's opinion be sought which were not accepted by the organ concerned. On the authority and the binding force of advisory opinions, she reaches the unoriginal conclusions that States adopt whichever view suits their interests in relation to a particular opinion, and that the 'authoritative' or 'binding' nature of the opinion is not crucial in determining whether a State will decide to comply with the Court's pronouncement. With reference to the *Namibia* opinion she submits (p. 353, note 118) that the expression 'agreed with' in the Security Council resolution receiving the opinion, employed in preference to the word 'endorsed' in relation to the Court's conclusions, is highly significant. The reluctance of all members of the Council to accept the legal premisses of the opinion 'meant that the Council was not prepared to view those of its decisions that were taken outside the framework of Chapter VII as binding. If so, Resolution 301, in which the Council "agreed with" the opinion's conclusions, did not create any legal obligation for states to accept those conclusions.' We may hear more of such arguments in future U.N. debates on the problems of Southern Africa.

In all, this is not only a valuable contribution to our knowledge and understanding of the role of the Court in international relations and the working of international organization generally, but is also a most interesting book to read. It should remain of value for a long time to come.

GILLIAN WHITE

Die Rechtsordnung des Festlandssockels. By BERND RÜSTER. *Schriften zum Völkerrecht*, Band 58. Berlin, Munich: Duncker & Humblot, 1977. 535 pp. DM. 148.

The title of this volume is misleadingly modest as the author has placed his study of the legal regime governing the continental shelf within the broad context of present efforts to establish a new world order of the oceans. His approach to the intricate complexity of the multiple problems involved in the law of the sea fittingly reflects the position of the law at the close of an era of some *lex lata*, however precarious or eroded, and now at the threshold of an expected new and comprehensive legal order for the oceans. The book is divided into three parts. The first part offers an illuminating introduction describing the various biological, mineral, commercial, scientific and military uses of the oceans as well as the possible perils to ecological balance as a result of uncontrolled pollution and exploitation. The second part deals with the legal regime of the continental shelf and is preceded by a historical survey of developments relating to the concepts of the freedom of the high seas and of the territorial sea. The third and last part examines the problems of the seawards and lateral boundaries. This is rounded off with sketches of case studies on, for example, the controversy over Gotland between the Soviet Union and Sweden, the dispute in the Channel—adjudicated in the meantime—between the U.K. and France, the

dispute in the Gulf of Venezuela between that country and Colombia, the Aegean conflict between Turkey and Greece and some others.

Valuable annexes with references to the national continental shelf legislation of some ninety-two States and of relevant treaty practice and an impressively rich bibliography complete this volume. Throughout this extremely well-documented monograph it has been the author's endeavour to let facts of State practice, whether unilateral or by way of treaties, speak for themselves. Although the author is perhaps unduly pessimistic with regard to the prospects for success of UNCLOS III, one feels bound to share his disappointment regarding the predictable failure of the conference to stem the already bewildering tide of nationalization of large portions of the oceans by coastal States. The once inspiring idea of the common heritage of mankind has been allowed to drift as it were into the middle of the oceans. On present accounts of scientific knowledge and technology it thus appears to involve a very much diminished heritage, the major part of the mineral riches of the oceans being situated within an intended global 200-mile E.E.Z. With the rejection of the relatively progressive American draft convention on the International Seabed Area mainly by developing States it had become clear that the battle for the protection of the freedom of the seas was turning into a battle for protection against such freedom. The author criticizes the expected failure of UNCLOS III yet again to establish a precise seaward limit for the continental shelf—a problem which had previously bedevilled the Geneva Conference—in view of the need to delimit precisely the extent of the common heritage of mankind. He rightly points out, on the other hand, that the continental shelf doctrine as such, and in particular the notions of continuity and a new version of Article 6 of the Geneva Convention as modified by the I.C.J. in the *North Sea Continental Shelf* cases, are likely to be retained by UNCLOS III. This well-structured and highly commendable book will continue to be of considerable value as a reference and source book for anyone with an interest in the law of the sea.

J. F. WEISS

International Law. By MALCOLM SHAW. London: Hodder and Stoughton Ltd., 1977. xiii+546 pp. (including notes and index). £2.75.

This is an introductory work in the *Teach Yourself* series, intended for students of international law, politics and international relations and for the general reader. It is a comprehensive survey of the subject without the detail which, it is assumed, the reader will obtain from the standard works. The arrangement of the book is conventional with introductory chapters followed by discussion of the sources and subjects of international law, the relationship between international and municipal law, recognition and the traditional substantive topics. Treatment of the material tends to be descriptive rather than analytical and whilst the statement of legal principles is generally clear and accurate, the style is sometimes rather glib and journalistic.

How much detail can be omitted in a work of this kind is a matter on which views will differ. A fuller treatment of the issue of human rights and particularly the European Convention would have been very useful. An indication that executive certificates may sometimes be difficult to construe would also have been helpful, together with some consideration of why English judges have often been reluctant to apply rules of international law. The fact that in both the *North Sea Continental Shelf* and the *Namibia* cases there were a number of forceful dissents could also have been mentioned (and it is disconcerting to find the latter referred to as the *Legal Consequences* case). The *Trendtex* case is rightly examined when the author considers whether *stare decisis* applies to the English courts' decisions on questions of customary international law, but should also have been included in his discussion of sovereign immunity.

A number of points of substance call for comment. The statement that 'we shall soon be able to take note of all the factors involved in a particular decision and all the possible

and probable ramifications' (p. 55) grossly exaggerates the potential of behavioural and quantitative studies of decision-making. The discussion of the *Anglo-Norwegian Fisheries* case (p. 77) overlooks the fact that the Court's remarks as to the relevance of Norwegian conduct were based on the supposition that a new rule of customary law was then in process of formation. Estoppel (p. 226) is not a technique but a doctrine, and in the *Temple* case acceptance by Thailand of the erroneous boundary and the question of whether she was estopped from challenging it were two issues, not one. The discussion of servitudes (pp. 232-4) is rather confused and the brief account of the *Sabbatino* case (p. 309) is unclear and somewhat out of place. The discussion of reservations *ratione temporis* to declarations under the Optional Clause (p. 405) is also uncharacteristically vague and seems to indicate a misunderstanding of their significance.

There is an index and a table of cases. The footnotes, which are at the end of the book, are confined to case references and make no mention of the periodical literature. There is, however, a list of suggestions for further reading, which students will find useful.

J. G. MERRILLS

Les Traités internationaux devant le Parlement (1945-1955). By PAUL F. SMETS, with the assistance of FRANÇOISE DRION (Centre Interuniversitaire de Droit Public). Brussels: Établissements Émile Bruylant, 1978. 508 pp. (plus annexes and bibliography). Bfr. 930.

The present volume is the fourth in Professor Smets's excellent studies of the constitutional aspects of treaty-making in Belgium. Earlier works covered the powers of the legislature (*L'assentiment des Chambres législatives aux traités internationaux* (1964)), the role of the Conseil d'État (*Les traités internationaux devant la Section de législation du Conseil d'État* (1966)) and executive agreements (*La conclusion des accords en forme simplifiée* (1969)), and the last was reviewed in a previous volume of this *Year Book*. With the present work Professor Smets returns to his earliest theme and provides a greatly expanded account of the theory and practice of parliamentary approval, accompanied by case studies of the handling of a number of major treaties in the period under review.

Professor Smets starts with a comprehensive analysis of the various stages in the elaborate process of parliamentary approval, beginning with those exceptional cases in which notification occurs before signature, but focusing on the functioning of the parliamentary commissions appointed to review and report on new treaties. This is followed by a discussion of the procedure for public debate in both Chambers of the legislature, illustrated with many practical examples. Two other means of potential parliamentary control are then briefly considered: the power deriving from the Government's need to secure approval of its foreign affairs budget and the device of the parliamentary question.

Finally, in a series of chapters which occupies over half the work, the author provides a detailed account of the parliamentary treatment of five major treaties to which Belgium became a party in the period under review. The treaties in question, all of which concerned international institutions and therefore raised important constitutional issues, were the United Nations Charter, the European Convention on Human Rights, the treaties setting up the European Coal and Steel Community and the European Defence Community, and the Paris Accords of 1954.

From these case studies and from the earlier evidence it seems clear that in Belgium the various forms of parliamentary control are in practice both cumbersome and ineffective. It is easy to assume that this points to the need to subject treaties to a more effective, though not a more elaborate, form of control. However, Professor Smets's own studies have shown that satisfactory procedures to achieve this may be difficult to devise, particularly in respect of executive agreements, whilst the experience of States in which a greater degree of legislative control has been developed suggests that the exposure of

delicate issues of foreign policy to crude and often parochial political pressures may be a very high price to pay.

The three appendices set out the texts of a 1951 memorandum from the Belgian government to the Secretary-General of the United Nations on the conclusion of treaties, a note on the procedure for approving international conventions and an opinion of 1953 in which M. Paul De Visscher and others reviewed the constitutional implications of Belgian participation in the European Economic Community.

There is an analytical table of contents instead of an index and a short bibliography of works in French, English and Italian.

J. G. MERRILLS

Les Nouvelles Conventions de la Haye: leur application par les juges nationaux. Edited by M. SUMAMPOUW (T. M. C. Asser Instituut). Leyden: A. W. Sijthoff, 1979. xx+458 pp.

This collection of decisions on the Hague private law conventions is a much enlarged and updated version of two earlier publications under the same auspices (published in 1970 with a supplement (larger than the original volume) in 1972). Further supplementation is planned. The first and largest section summarizes decisions, almost exclusively of Western European courts, on nine of the conventions (out of the twelve in force by 1 January 1976). No fewer than two hundred pages are spent on the two Conventions (No. VII of 1956; No. IX of 1958) relating to 'obligations alimentaires envers les enfants', but there are useful sections on the Civil Procedure Convention (1954) and the Protection of Minors Convention (1961).

A second section lists signatures, ratifications and accessions, declarations, reservations and accompanying designations, and other information, as at 1 January 1976, for the twenty-four conventions concluded between 1954 and 1973. A final section contains a useful bibliography.

A compilation of this kind must be most useful to lawyers with problems arising under any of the conventions dealt with. English courts, for example, have recently accepted the need to consider foreign decisions on the interpretation of private law conventions, and since few libraries will contain the foreign law resources to allow independent research on such issues, this collection will be a most convenient starting-point. At the same time there is abundant evidence (e.g. in recent studies of the Hague and Warsaw Conventions) of the extent to which divergent interpretations have led to the 'judicial disunification' of uniform law-making conventions. Anything which helps to check this tendency must be helpful.

Indeed, there is a real question whether some more ambitious and flexible service could not be provided for developments and decisions on (at least) private law conventions generally. The use of loose-leaf services (with periodic supplementation) is now a commonplace of international and municipal law publishing. A 'Digest of Private Law Conventions' in this form, covering not only the Hague Conventions but other important universal private law conventions, providing details of ratifications, etc., together with summaries of implementing legislation and judicial decisions, would be a most useful source of reference. No modern municipal jurisdiction can afford to be without a comprehensive and up-to-date digest of decisions and developments. Surely this is true also of the important 'international jurisdictions' created by the vast network of private law treaties?

JAMES CRAWFORD

Sex-Based Discrimination. International Law and Organisation. Volume I. By R. F. and H. J. TAUBENFELD. New York: Oceana Publications, 1978. Loose-leaf. \$75.

This is the first of an annotated loose-leaf service intended to provide those concerned with the rights of women in international law with a convenient source of reference to

a wide variety of relevant materials. The present volume contains general international treaties on the subject, together with certain related documents, and is divided into five sections.

The first section contains fourteen general agreements specifically relating to the rights of women and their protection, ranging from the 1904 Agreement for the Suppression of the White Slave Traffic and its 1949 Protocol to the 1957 Convention on the Nationality of Married Women. Also included is the 1965 General Assembly Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, as well as the 1962 Convention on the same subject. The second section contains general agreements relating to women and to others and includes the 1926 Slavery Convention and its amending Protocol, the two United Nations Covenants on Human Rights and extracts from the United Nations Charter. The third and fourth sections contain a broad range of I.L.O. material relating to women. Included here are a number of treaties, some of which may well be unfamiliar to most readers of this *Year Book*, and a collection of important I.L.O. Recommendations and Resolutions. The final section contains two measures sponsored by U.N.E.S.C.O.: the 1960 Convention against Discrimination in Education and the 1962 Protocol to the Convention on the subject of conciliation and good offices.

Although there is no linking commentary or other editorial matter, each treaty text is accompanied by a full list of signatories, ratifications, accessions, reservations and declarations taken from a recent (but unspecified) edition of *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions*. It is surprising, however, to find no indication of the voting on the one General Assembly resolution that is cited. In keeping with the loose-leaf format the five sections are numbered separately and though views will perhaps differ as to the merits of this increasingly popular publishing arrangement, the advantages in such a rapidly developing area scarcely need emphasis.

Four further volumes are projected. Volume II will cover world-wide international organizations, Volume III regional organizations, Volume IV International Women's Year and Volume V representative national legislation. When the series is complete the editors intend to keep it up to date by producing further volumes, or material for insertion, on a regular basis. With the present work they have made an excellent start to what promises to be a most useful collection of human rights material. J. G. MERRILLS

Die immerwährende Neutralität Österreichs (Sonderheft). By ALFRED VERDROSS. Wien: Verlag für Geschichte und Politik, Wien, 1977 (and available in English: *The Permanent Neutrality of Austria*, Wien, 1978).

Twenty years after the publication of the first edition in 1958, Professor Verdross once again turned his scientific acumen to a subject which he had done much to elucidate earlier on. What used to be a compact pamphlet has meanwhile grown into a short monograph in which he critically examines both international practice and the legal literature of recent years. The sole aim of the study is the analysis of the principles of international law enshrined in the concept of permanent neutrality. It does not, therefore, deal with the features and the content of Austria's policy of neutrality, the determination of which is within her free discretion. None the less, Professor Verdross admits that neutrality policy cannot be separated from neutrality law in all respects since it has to relate to the State's ability to fulfil its legal duties flowing from the law of neutrality.

A brief introductory chapter clarifies the terminology and identifies Hugo Grotius' parentage of the concept of neutrality. This is followed by a description of the precedent of Switzerland's permanent neutrality and of the vacillations in the assessment of neutrality in the course of history.

An early proposal in 1919 by the last Prime Minister of Imperial Austria, Heinrich Lammasch, to give the Republic of Austria the status of permanent neutrality in accordance

with the Swiss model came to fruition only after the Second World War. Verdross presents a detailed account of the historical development of Austria's permanent neutrality as it began to unfold in governmental and diplomatic thinking in the post-war years. This process culminated in the Moscow Memorandum of 15 April 1955 and the adoption of the Austrian federal constitutional law of 26 October 1955, which is generally considered to be an exhaustive statement of Austria's neutrality duties. Its subsequent notification to other powers and its express or tacit acceptance by them has firmly entrenched Austria's status on the international plane. Verdross has been consistently emphatic on that point: any change in Austria's permanent neutrality can only be achieved through international agreement.

A necessary starting-point for any statement on Austria's permanent neutrality is the neutrality guidelines of the Swiss Ministry of Foreign Affairs of 26 November 1954 in which, in its own words, it had summed up prevailing doctrine. These guidelines have subsequently become known as '*conception officielle suisse de la neutralité*', an incorrect description, as Professor Verdross has pointed out, since they are based on a working paper by Professor Rudolf Bindschedler, head of the Legal Department of the Ministry at the time.

Austria's own obligation to observe permanent neutrality implicitly includes all obligations pertaining to the Swiss model, as it was expressly referred to in the Moscow Memorandum.

A separate chapter on the content and scope of Austria's neutrality duties distinguishes between primary neutrality duties which must be observed by every neutral State and secondary duties incumbent only upon a permanently neutral State, duties which are discharged in the form of abstention, prevention and acquiescence. These modifications of a State's freedom of action must be interpreted restrictively. Consequently, the duties of neutrality do not come into play in case of armed conflicts which are not wars in the legal sense.

A difficult problem is that of neutrality in case of civil war. A resolution of the Institut de droit international of 14 August 1975 prohibits any military, financial and economic support for either of the conflicting parties. However, the question of the proper conduct of third States in the face of forcible attempts to secure the right of self-determination of peoples was not considered.

Chapters 13 and 14 discuss permanent neutrality within the framework of the U.N. and the Council of Europe and in relation to economic integration respectively.

It is true that the view was expressed at San Francisco that permanent neutrality is incompatible with the system of collective security as conceived at the time. Verdross, however, persuasively reiterates his view that the unopposed acceptance of Austria as a member of the United Nations by powers which had previously accepted its permanent neutrality constitutes an authentic interpretation of the Charter and also represents an informal consensus capable of disposing of any argument based on the collision rule in Article 103 of the Charter. Verdross's assertion that the Security Council's discretion under Article 48 of the Charter as to requests to member States to participate in military enforcement measures enables it to 'spare' a neutral, although irrefutable in theory, has luckily never been put to the test, owing to a failure to implement Chapter VII of the United Nations Charter.

Austria participated in the non-military U.N. sanctions against Rhodesia considering, however, that it is up to the government to decide in each case the issue of compatibility with its status as a permanently neutral State. Verdross approves of that course of action in the case of the Rhodesian sanctions but doubts that Rhodesia has been a State capable of involvement in an inter-State conflict. Neutral duties could not therefore have been infringed.

Relatively little space is devoted to the question of participation in U.N. peace-keeping operations despite the considerable involvement of Austria and other neutral States in that particular U.N. practice.

In view of the crucial role attributed to the Security Council of being obliged to safeguard Austria's position as a permanently neutral State, recent tendencies to assert Security Council supreme control over peace-keeping operations can only be welcomed. (Cf. Draft Guidelines on Peace-Keeping in the Report of the General Assembly Committee on Peace-Keeping Operations.)

On the question of the compatibility of permanent neutrality and economic integration, Verdross states what must be considered the dominant view, namely that Austria's full membership in the E.E.C. would clash with its legal duties as a neutral State since the E.C. Treaties (cf. Article 224 E.E.C.) would remain valid in times of war. An extensive account of official Austrian attitudes towards the E.E.C. from 1962 onwards serves to demonstrate official caution. Regrettably perhaps, no alternative approaches to these rather dogmatic official positions seem to have been seriously examined so far. As these would consist of alternative policy strategies within the law they were at any rate outside the scope of Verdross's book.

The concluding chapter on permanent neutrality and the principle of peaceful coexistence reminds the reader that even though arms may remain silent, ideologies continue to compete. Permanent neutrality does not mean ideological neutrality and individuals are not addressees of the laws of neutrality. A permanently neutral State is a State permanently interested in the maintenance of peace. Commitment to pluralistic democracy is commitment to an arena of rival ideologies seeking peaceful and orderly adjustment in the political process.

Professor Verdross's book is the work of an eminent scholar and expert and does not merely represent his personal view as he modestly claims in his Preface. There can be little doubt that his treatment of Austria's permanent neutrality would in fact warrant the description '*conception officielle autrichienne de la neutralité*'. It is a book to be recommended as greatly rewarding reading for lawyers as well as political scientists and historians.

J. F. WEISS

DECISIONS OF BRITISH COURTS DURING 1979 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW*

International Amateur Athletic Federation—membership open to any ‘country’—whether ‘country’ equivalent to ‘State’—expulsion of Taiwan invalid

Case No. 1. Reel v. Holder, [1979] 1 W.L.R. 1252, Forbes J. In general, disputed issues of the international status of States and governments in common law courts are determined by executive certification, which in effect means that the recognition practice of the *forum* will be determinative. However, at least in cases involving private transactions such as contracts, it may be possible for the courts to avoid the certification rule by a process of construction.¹

In this case the International Amateur Athletic Federation was an unincorporated association with its head office in England. Rule 1 of the Federation’s Rules provided:

1. The . . . Federation . . . shall comprise duly elected national governing associations or federations for the control of amateur track and field athletics, cross-country, running and walking . . . Only one member for each country can be affiliated.

2. The jurisdiction of members of the federation shall be limited to the political boundaries of the country they represent.

In 1954 the All China Athletic Association, which controls amateur athletics in mainland China, was elected to membership of the I.A.A.F. At the same time, the relevant Taiwan association was invited to apply: it was admitted in 1956, whereupon the mainland association withdrew in protest. However in 1978, in Puerto Rico, the mainland association was, by majority vote, accepted as an I.A.A.F. member, with jurisdiction also over Taiwan, to the exclusion of the Taiwan association. In determining the ‘validity’ of these acts, the initial and indeed primary question was whether Taiwan could properly be regarded as a separate ‘country’ within the meaning of Rule 1, or whether the relevant ‘country’ was the entire territory of China (including Taiwan). As a matter of international law it seems that the State, China, does incorporate both the territory under the control of the People’s Republic and that under the control of the Republic of China.² This is certainly the view of the United Kingdom Government.³ But the Rules used the term ‘country’, which is not necessarily co-extensive with the term ‘State’: its meaning is a matter for the court, not the Foreign Office. In fact Forbes J. held that Taiwan was a separate ‘country’ within the meaning of Rule 1, with the result that the Taiwanese association remained in law a member of the I.A.A.F. On the central point, his reasoning was as follows:

I am reminded . . . that in construing terms in a contract such as this . . . surrounding circumstances may ‘stamp upon a contract a popular or looser meaning’ than the strict legal meaning. The contract one here has to construe has as surrounding circumstances

* © Dr. James Crawford, 1980.

¹ Cf. *Luigi Monta of Genoa v. Cechofracht Co. Ltd.*, [1956] 2 Q.B. 522 (‘government’).

² See this writer, *The Creation of States in International Law* (1979), pp. 143–51, for a review of authority.

³ *Ibid.*, p. 149; [1979] 1 W.L.R. at p. 1263.

that it was intended to govern the affairs of an international association dedicated to promoting and controlling friendly competition in athletic games between the inhabitants of various countries of the world. The term 'country' would not appear to be one which has a particular significance in international law . . .

No one suggests that this case falls to be determined on any question of national or international recognition by government so that the fact that neither Her Majesty's Government, nor for that matter the United Nations, recognises the existence of Taiwan as a separate national entity does not assist. When I say 'no one suggests', I mean neither counsel in this case, though it is noteworthy that in the passage from the minutes which I have read it appears that that may have been one of the matters which were considered by the federation's congress when passing the resolution. I do not think that either the meaning of the term 'country' or the identity of a country, once defined, can conclusively be deduced from the attitudes, or aspirations, of these respective authorities or even of the athletes themselves. The word must be given its ordinary meaning, having regard to the 'factual matrix' in which it was formed. I should find it surprising if the ordinary person did not regard Scotland and Wales as being examples of countries; in doing so they would not be considering the existence, or absence, of a separate government, nor the desire, or lack of it, of any of the inhabitants of either area to achieve the position of belonging to a separate state . . . Despite reference to 'international' competition and to 'national' authorities in the I.A.A.F. rules, I see no warrant for equating 'country' with 'nation', for the terms 'international' and 'national' are not insisting on nationhood in the sense of political independence or ethnic origin. The significant part of rule 1 seems to me to be that the bodies to be elected must be those 'in control of amateur track and field athletics' in the countries which they represent. The sentence in rule 1.1 'Only one member for each country can be affiliated' was never, in my view, intended to regulate differences caused by rival political claims to sovereignty; it was clearly introduced to prevent, or compose, a situation where, although the identity of the country was not in dispute, there were two or more rival associations within the country claiming that they were in control of the athletes situated there.¹

Although the principle of interpretation applied here is undoubtedly correct, its application was, perhaps, more problematical. For the 'country' which is eligible for membership under Rule 1 (1) is by Rule 1 (2) stated to have 'political boundaries': it is doubtful whether the boundary between, say, Wales and England could be described as 'political' (at least in the absence of some clear and universal practice of the organization). His Lordship did not expressly consider whether the 'boundary' between Taiwan and the mainland could be described as a 'political' one.

Sovereign immunity—Action in personam—Trendtex Trading Corporation v. Central Bank of Nigeria not followed—whether claim arising from nationalization decrees iure imperii or iure gestionis

Case No. 2. The Uganda Co. (Holdings) Ltd. v. Government of Uganda, [1979] 1 Lloyd's Rep. 481, Donaldson J. *Trendtex Trading Corporation v. Central Bank of Nigeria*² created a major problem for the 'common law' of sovereign immunity. The Privy Council had previously predicted that the House of Lords would not extend the doctrine of restrictive immunity to actions *in personam*.³ The Court of Appeal had previously (by majority) held itself incompetent to do so.⁴ Undeterred, the majority in

¹ [1979] 1 W.L.R. at pp. 1263-4.

² [1977] Q.B. 529; this *Year Book*, 48 (1976-7), pp. 353-62.

³ *The Philippine Admiral*, [1977] A.C. 373 at p. 402.

⁴ *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 1 W.L.R. 1485; this *Year Book*, 47 (1974-5), pp. 362-4.

Trendtex had proceeded to make the extension, by way of a radical reaffirmation of Lord Mansfield's uncertain doctrine of incorporation. Since international law is (if not generally, at least on particular matters accepted as appropriately governed by it¹) part of the law of England, they held that changes in international law must equally be incorporated in English law, notwithstanding earlier English decisions (based upon an *ex hypothesi* different international law rule) to the contrary. If common-law courts are to play a part in harmonizing international and local law, this underlying doctrine is of central importance. But its implications for precedent had been denied in the *Thai-Europe Tapioca* case,² and a second problem of precedent was thus added to the first.

In this case the plaintiffs claimed an indemnity against the Government of Uganda as successor to two Ugandan companies, the first a co-guarantor with the plaintiffs of liability in respect of borrowings of the second. The loan contract was governed by English law and was to be performed in England. The succession to the Ugandan companies' liabilities, on the other hand, arose not under the contract, but pursuant to Ugandan decrees providing for the compulsory acquisition of the property of the two companies, and for the subrogation of the Ugandan Government to 'all liabilities and obligations' of the companies (subject to ministerial ratification in the case of 'any contract or agreement relating to any property or business').³ The Ugandan Government applied to set aside the writ on the grounds of sovereign immunity. Two issues thus arose: whether the doctrine of restrictive immunity was to be applied, and whether this transaction was (*vis-à-vis* the Government) one *iure imperii* or *iure gestionis*. The latter question provided, one would have thought, a rather more obvious and easier solution to the case than the former: none the less Donaldson J. grasped (it would not be unkind to say, grasped at) the nettle of the problem of precedent, and, in the event, declined to follow *Trendtex*. Although there was no question that *Trendtex* was decided *per incuriam*,⁴ there was a direct conflict between *Trendtex* and *Thai-Europe*.⁵ A judge at first instance, faced with such a conflict, was entitled to choose which decision to follow.⁶ The earlier case was to be preferred, for two reasons:

The decision in *Trendtex* seems to me to break new ground in two respects. The first is the decision that the doctrine of restrictive sovereign immunity applies to actions in personam. The second, which is perhaps even more far reaching, is that there is an exception to the rule of stare decisis. It would follow that there is no settled law in relation to sovereign immunity and that while I should, of course, pay respectful attention to the views of Lord Denning and of Lord Justice Shaw, it would nevertheless be my duty to form my own view on the extent to which international law currently restricts sovereign immunity.

I consider that I should follow *Thai-Europe* because a decision which asserts the doctrine of precedent must logically have more weight *as a precedent* than one which denies or modifies that doctrine. Furthermore, I attach great weight to the forecast by

¹ This is an ambiguity often unnoticed in discussion of the doctrine of 'incorporation'. It is evident, for example, in the alternative versions of Abbott C.J.'s judgment in *Novello v. Toogood*, (1823) 1 B. & C. 554; 2 Dow. & Ry. K.B. 833. According to Barnewall & Cresswell, he said that the Act of 1707 must 'be construed according to the common law, of which the law of nations must be deemed a part' (at p. 562). But Dowling & Ryland have: 'it is to be construed according to the principles of the common law, and *in questions of this kind*, I think the law of nations is to be considered as part of the common law' (at p. 839, emphasis added). But it has never been doubted that sovereign and diplomatic immunity are 'questions of this kind'.

² *Supra*, p. 218 n. 4.

⁴ At pp. 484, 485.

³ See [1979] 1 Lloyd's Rep. at p. 487.

⁵ At p. 486.

⁶ At pp. 483-5.

the Judicial Committee of the Privy Council that the House of Lords will be unwilling to abandon the absolute rule of immunity in actions in personam whatever may happen with regard to actions in rem . . .

If I were to follow the *Trendtex* decision, I should perhaps be free to reach a new and individualistic decision on what is the current rule of international law, since, on this basis, international law itself knows no rule of stare decisis and nor does English law in relation to rules of international law. However, there has been no serious attempt to provide me with the necessary materials and I will not do so.¹

His Lordship's reasons for preferring the earlier case are, with respect, unconvincing. The notion that 'a decision which asserts the doctrine of precedent must logically have more weight as a precedent than one which denies or modifies that doctrine' is a simple non-sequitur. It assumes that a rule of precedent has the same logical status as the content of a substantive rule of law. On that view, it is arguable (indeed, it has been argued) that the House of Lords is still bound by its own decisions, since its decision to modify the *London Tramways* rule² must have less logical weight than the *London Tramways* decision itself. This type of mistake has been fairly thoroughly discredited.³

The subsidiary reliance on the *dictum* in *The Philippine Admiral* cannot, of course, be criticized in the same way, but its predictive value might well have been regarded as minimized, both by the *Trendtex* case itself and by the subsequent adoption (albeit prospectively only) of the restrictive theory in the State Immunity Act 1978. In any event, it is unclear in the state of the authorities what a first instance decision could have added to the law, except further uncertainty. The Court of Appeal was likely to adhere to its later decision: it did not contribute to a confused body of law for a judge at first instance not to do so. In fact Robert Goff J. had already accepted the authority of *Trendtex*, in a judgment which in some respects at least markedly contributed to the decisional law.⁴ A High Court judge faced with *The Uganda Co. (Holdings)* case thus had the unhappy task of deciding which conflicting statement of co-ordinate authority to prefer on which conflicting decision of binding authority to prefer: it is, perhaps, regrettable that his Lordship did not offer a (logical?) solution to that dilemma. The Court of Appeal, *pro tempore*, having now done so,⁵ one must suppose the combined weight of its two 'incorrect' decisions to outweigh the primal rectitude of *Thai Tapioca*. But on some versions, at least, of his Lordship's 'logical' argument that might not be so.

Finally, his rejection of *Trendtex* was clouded by an apparent misunderstanding of the effect of that decision. The assumption seems to have been that acceptance of *Trendtex* would have left him 'free to reach a new and individualistic decision on what is the current rule of international law'.⁶ But it would not be open to a judge bound by Court of Appeal decisions to hold that the international law rule is other than that stated in *Trendtex*, unless it could be shown on credible material that the international law rule had changed yet again since that decision. *Trendtex* decided, for English courts other than the House of Lords, what the rule then was. (A similar view of it had been taken by the Privy Council.) Obviously no such change has occurred. His Lordship seems to have thought that the only alternative to a static unchanging law was one in con-

¹ At pp. 486-7.

² [1898] A.C. 375.

³ See R. Cross, 'The House of Lords and the Rules of Precedent', in P. M. S. Hacker & J. Raz, *Law, Morality and Society, Essays in Honour of H. L. A. Hart* (Oxford, 1977), pp. 145-60. For similar criticism of Donaldson J.'s reasoning, see R. Higgins, 'The Death Throes of Absolute Immunity: The Government of Uganda before the English Courts', *American Journal of International Law*, 73 (1979), pp. 465-70.

⁴ *I Congreso del Partido*, [1978] Q.B. 500; this *Year Book*, 49 (1978), pp. 262-7.

⁵ *Infra*, Cases Nos. 3 and 4.

⁶ [1979] 1 Lloyd's Rep. at p. 487.

stant flux, a chameleon taking its colour from the court where it chanced to be. That is vastly to overstate the modification to the doctrine of precedent inherent in *Trendtex*.

The question whether this particular transaction was *iure imperii* or *iure gestionis* was of lesser difficulty. Donaldson J. said:

... the fundamental difference between the parties is as to the meaning and effect of legislation designed to achieve the compulsory acquisition of properties and businesses and ... this is a classic example of an act which is *jus imperii* as contrasted with one which is *jus gestionis*.

The plaintiffs' answer to this is that the validity of the legislation is not in issue. Their whole claim is based upon the Ugandan decree. This answer is superficially attractive. It becomes less so when regard is had to art. 6 of the 1972 decree ...

[N]o statutory order has been made under art. 6 (2) or under the corresponding art. 7 (2) of the 1975 decree. The plaintiffs say that, assuming this to be true, they can nevertheless succeed by virtue of the general words of art. 1 which vested in the government all the specified properties and businesses without further assurance. This, they submit, must of itself vest the liabilities as well as the assets if the legislation is not to be regarded as confiscatory. The defendants do not accept this argument. I express no view upon the merits of these arguments. Suffice it to say that I am satisfied that the litigation would involve the Court in expressing an opinion on the meaning and effect—and perhaps the propriety—of Ugandan legislation in a suit to which the government of that state would be a party. I do not think that even the most enthusiastic supporter of the restrictive doctrine of sovereign immunity would hold that it extends this far. It follows that even if I had felt free—or bound—to follow and apply the law as stated in *Trendtex*, I should still have determined this application in favour of the defendant government.¹

There is no doubt as to the correctness of this aspect of the decision, but the reason why the transaction was governmental rather than commercial might perhaps have been expressed with greater precision. It was not that the Court was required to interpret the Ugandan decrees (courts are often required to interpret and apply foreign legislation: it has never been suggested that this is *per se* a ground for granting immunity). Rather, the source of the Government's asserted liability here could only have been the decrees themselves or an act of ratification pursuant to them. The fact that the original transaction between the plaintiff and the Ugandan companies was commercial was irrelevant in assessing the nature of the distinct liability created by or pursuant to those decrees.²

Sovereign immunity—action in personam—Trendtex Trading Corporation v. Central Bank of Nigeria followed—whether issue of Mareva injunction against Central Bank funds contrary to international law

Case No. 3. *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd's Rep. 277, C.A. The facts in this case were practically identical with those in

¹ At pp. 487–8.

² It is not entirely clear that the Government would also have been immune under the State Immunity Act 1978 had the transaction occurred after the Act came into force. Although this liability arose 'in the exercise of sovereign authority' (s. 3 (3) (c)), that requirement (which incorporates the *iure imperii*/*iure gestionis* distinction) does not apply to those 'commercial transactions' defined in s. 3 (3) (a) and (b), which include: '(b) any loan ... and any guarantee or indemnity in respect of any such [loan]'. Presumably, however, the Government could have argued that s. 3 (1) only applies to transactions 'entered into by the State', and that this excludes obligations assumed by virtue of legislation. *Quaere* whether subsequent ratification pursuant to the decrees might have been regarded as an entering into the transaction by the State? That there is any doubt on the point emphasizes the extent to which the Act goes beyond the generally accepted position in restricting immunity.

Trendtex Trading Corporation v. Central Bank of Nigeria.¹ The defendant bank refused to honour its obligations under an irrevocable letter of credit issued in respect of a contract for the purchase of cement for the Nigerian Ministry of Defence. In March 1976 a *Mareva* injunction was issued against the Bank in respect of the transaction. The Bank applied to have the injunction set aside on the grounds that, even if it was not immune from suit, as a Central Bank its funds were immune, by international law, from execution. Its application succeeded before Donaldson J.; however, the plaintiff's appeal was allowed, with leave to appeal to the House of Lords.

Two issues arose before the Court of Appeal. First, it was argued that *Trendtex* was decided *per incuriam*, and *The Uganda Co. (Holdings)* case² was cited in that regard. Lord Denning M.R. (with whom Waller and Cumming Bruce L.JJ. agreed) simply said 'that *Trendtex* was not decided *per incuriam*'.³ At Court of Appeal level, there was to be no reconsideration of that decision.

The second issue involved the propriety of ordering execution against Central Bank funds. The argument related not to the particular problems of the *Mareva* injunction,⁴ but to the propriety as a matter of international law of any form of execution against the Bank. Lord Denning M.R. said:

Mr. Kemp urged that whatever the position was at the date of the *Trendtex* case, the position today is different even in international law because of statutes which have since come into force. On Oct. 21, 1976, the Foreign Sovereign Immunities Act of 1976 came into force in the U.S.: and on July 20, 1978, the State Immunity Act, 1978, of our own Parliament came into force. Mr. Kemp urged that international law has been changed by those statutes: and we ought to recognise that alteration today.

In both those statutes there are provisions which say that, so far as the property of a foreign central bank is concerned, it ought not to be taken in execution. Further that an injunction ought not to be issued so as to impair the dealings of a foreign central bank with its funds.

There is, however, a difference between the United States statute and the English statute. The United States statute says that—

'... the property of a foreign state shall be immune from attachment and from execution if—(1) the property is that of a foreign central bank or monetary authority held for its own account.'

What do the words 'held for its own account' mean? There is an explanatory memorandum attached to the Bill of Congress. It says:

'[The immunity] applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states.'

Stopping there, it can well be argued that the funds which are in question here are not

¹ [1977] Q.B. 529.

² *Supra*, Case No. 2.

³ [1979] 2 Lloyd's Rep. 277 at p. 279.

⁴ Apart from the general issues of the use and extent of the *Mareva* injunction (as to which cf. *The Siskina*, [1978] 1 Lloyd's Rep. 1 (H.L.)), there are *dicta* in *Établissement Esefka International Anstalt v. Central Bank of Nigeria*, [1979] 1 Lloyd's Rep. 445, which deny the propriety of granting an injunction where there is no reason to suspect that the defendant will not satisfy any judgment against it: in particular, such an assumption cannot be made against a foreign government or Central Bank. See at p. 448 *per* Lawton L.J. The *Esefka* case was not cited in any of the judgments in *Hispano Americana Mercantil*.

held in connection with the central banking activities of the Central Bank of Nigeria but are being used to finance the commercial transactions of other entities: for example, the Ministry of Defence, the Ministry of Housing and the like which were ordering cement for use in Nigeria at the time.

The reason given for this in the explanatory memorandum is this:

'If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.'

Those are no doubt reasons which would appeal to commercial interests in the City of London equally as they would in the City of New York. No doubt for similar reasons s. 13 (2) and (4) coupled with s. 14 (4) of our statute make it clear that the property of the central bank of a foreign State ought not to be seized: and an injunction ought not to be granted to prevent the bank dealing with it.

But I stress this, that this Act does not apply retrospectively. It only applies to transactions which took place after it came into force—which was in November, 1978. Before that date merchants will have conducted their transactions and entered into contracts under the law as it previously was and not under the law as it is now embodied in the 1978 statute.

So I would say that the English Act is not applicable to the transactions in this case. So far as the American statute is concerned, it seems to me that it does not apply to this case at all because it can be argued that these funds are not being held by the Central Bank of Nigeria 'for its own account'. They are held not for its own central banking activities but for the activities of Government departments in Nigeria.

Apart from these two grounds, it seems to me that the international law remains as I stated it in the *Trendtex* case. We had before us a decision of the Provincial Court of Frankfurt in which (in a precisely similar case to ours) an injunction had been granted: and in the *Trendtex* case (operating as we thought in accordance with international law as it then stood) we granted an injunction. It seems to me that the latest statutes of the U.S. and of our Parliament are not sufficient to alter the international law as we stated it.¹

Waller L.J. agreed:

As an important part of his submissions [counsel] has drawn attention to two Acts—the enactment of the U.S. and the State Immunity Act, 1978—as showing that international law would grant immunity in such a case as this. But in my view, as my Lord has already said, we should look at this case as the law stood when the contracts were made in 1975, and when the case was heard in March, 1976: and in those circumstances the learned Judge imposed this injunction, and I do not think that we should interfere with it.²

It was suggested in an earlier note³ that the issue of execution against Bank funds might well be the most vulnerable point in the *Trendtex* decision. The distinction between immunity from suit and immunity from execution is accepted in other contexts,⁴ and might well have been thought to apply here. Perhaps such execution was justified on the basis that, the Bank having been held to be an entity separate from

¹ [1979] 2 Lloyd's Rep. at p. 279.

² At p. 280.

³ This *Year Book*, 48 (1976-7), p. 362. Cf. *United States of America v. Dollfus Mieg et Cie. S.A.*, [1952] 1 All E.R. 572; this *Year Book*, 29 (1952), pp. 458-60; *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia*, [1955] A.C. 72 at p. 89.

⁴ e.g., in respect of diplomatic and consular immunity: cf. Vienna Convention on Diplomatic Relations 1961, Art. 32 (4); Diplomatic Privileges Act 1964; Vienna Convention on Consular Relations 1963, Art. 45 (4); Consular Relations Act 1968.

the central government, there was no sufficient indication that its funds were the property of the government so as to attract immunity.¹ But, whatever the law might have been in January 1977, it can hardly have been argued that the two Acts of themselves changed (as distinct from clarifying) the position. The refusal to reopen it here (after it had been, perhaps not very fully, considered in *Trendtex*) seems therefore to have been justified, the more so because it will now fall to the House of Lords to pronounce on this uncertain area of law.

Sovereign immunity—action in rem—act iure imperii leading to breach of commercial transaction

Case No. 4. I Congreso del Partido, [1980] 1 Lloyd's Rep. 36, C.A. The decision of Robert Goff J. at first instance in this case was fully discussed in the last volume of this *Year Book*.² Briefly, the case involved claims by a Chilean corporation (I.A.N.S.A.), the importer of sugar under a contract with a Cuban government instrumentality, Cubazucar. The two shipments in question were in the ships *Playa Larga* and *Marble Islands*, under bills of lading arranged with a separate Cuban instrumentality, Mambisa. At the relevant time the *Playa Larga* was owned by the Cuban government, the *Marble Islands* by a Liechtenstein corporation (though it was subsequently purchased by the Cuban government). Both ships were chartered to and operated by Mambisa. When the Allende regime was overthrown in the *coup* of September 1973, the Cuban government ordered the *Playa Larga* to cease unloading its cargo and to leave Valparaíso; it also diverted the *Marble Islands* (then on its way to Chile). Both loads of sugar (by then paid for and in Chilean ownership) were thus in effect appropriated by the Cuban government. I.A.N.S.A. commenced proceedings against Cubazucar, Mambisa and the Cuban government. The proceedings against Cubazucar took the form of an arbitration before the Council of the Sugar Association of London under the contract: the award, broadly in favour of I.A.N.S.A., was made in the form of a Special Case for decision by the Commercial Court.³

The proceedings against Mambisa, as proceedings *in rem*, depended on whether the two ships were 'beneficially owned as respects all the shares therein' by Mambisa.⁴ Although there was some authority that this phrase includes the interest of a demise charterer, Goff J. held to the contrary.⁵ The action against Mambisa thus failed and was not proceeded with on appeal.⁶

That left the claim against the Cuban government itself, which raised the central issue of sovereign immunity. The case was argued before a Court of Appeal consisting of Lord Denning M.R., Eveleigh & Waller L.JJ. However, Eveleigh L.J. had to withdraw before argument was completed, and the appeal proceeded before two judges only. In the event, Lord Denning would have upheld the appeal and refused immunity; Waller L.J. agreed in substance with Goff J. In view of these rather unusual

¹ Cf. [1977] Q.B. 529 at p. 572 *per* Stephenson L.J.

² This *Year Book*, 49 (1978), pp. 262-7.

³ Award of the Council of the Sugar Association of London, 18 April 1978 (typescript, pp. 1-74 plus Appendices I-IV).

⁴ Administration of Justice Act 1956, s. 3 (4) (b).

⁵ [1978] 1 Q.B. at pp. 537-40, not following *The Andrea Ursula*, [1973] Q.B. 265 (Brandon J.). See this *Year Book*, 49 (1978), pp. 266-7.

⁶ There is thus a gap in the provision for actions *in rem* under the 1956 Act, compared with the Brussels Convention relating to the Arrest of Sea-going Ships 1952 (Cmd. 1128), Art. 3 (4). But cf. now State Immunity Act 1978, s. 10, and *The Father Thames*, [1979] 2 Lloyd's Rep. 364 at p. 371 *per* Sheen J.

circumstances and of the likelihood of an appeal to the House of Lords, it is proposed to give only a brief account of the judgments in the Court of Appeal.

Lord Denning first held that the bill of lading in respect of the *Playa Larga*, stated to be made with 'the owner of the . . . ship', was in fact made with the Government of Cuba itself, as owner. The claim was thus one for breach of contract in respect of a commercial transaction. Given such a contract, the nature of the breach was irrelevant. On the basis of a restrictive theory of immunity (stated now in terms even broader than in *Trendtex*),¹ it followed that the government was liable.

A second reason for the same conclusion was that the government was liable for injury in respect of a commercial contract relating to the use of its ship (although the contract was with another party and the government-inspired breach the result of a 'governmental' rather than a commercial act) because the mere use of a government ship in trade was equivalent to a general waiver of immunity.²

In the case of the 'Playa Larga' the origin of all that happened was a simple commercial transaction by which the government of Cuba agreed to carry sugar to Chile and deliver it to the Chilean importers. When the 'Playa Larga' got to Valparaiso and failed or refused to deliver the cargo of sugar there—and afterwards refused at Callao—that was a plain repudiation and breach of that contract. Such an act—a plain repudiation of a contract—cannot be regarded as an act of such a nature as to give rise to sovereign immunity. It matters not what was the purpose of the repudiation. If it had been done for economic reasons—as, for instance, because the market price of sugar had risen sharply—it could not possibly have given rise to sovereign immunity. If it had been done for humanitarian reasons—as, for instance, because the Cuban government were short of sugar for their own people—or wanted to give it to the people of North Vietnam—equally it could not possibly have given rise to sovereign immunity. It was in fact done out of anger at the coup d'état in Chile—and out of hostility to the new regime. That motive cannot alter the nature of the act. Nor can it give sovereign immunity where otherwise there would be none. It is the nature of the act that matters, not the motive behind it. This is supported by the decision itself in *Trendtex v. Bank of Nigeria* and the parallel decisions in Germany and the United States. No one suggested that the policy of the new Nigerian government afforded any answer. It is also supported by the reasoning of four wise judges of the United States Supreme Court in *Alfred Dunhill v. Republic of Cuba* who held that 'the concept of an Act of State should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities'. That case concerned the U.S. doctrine of Act of State: which is similar to our doctrine of sovereign immunity.³

On the other hand, these arguments presented obvious difficulties when applied to the *Marble Islands*. The Cuban government was not the owner of the *Marble Islands* when the bill of lading was concluded. It was not contractually responsible for the carriage. It had not permitted her to be used in trade. Its intervention to divert the *Marble Islands* and its subsequent appropriation of the cargo could thus only be tortious. But the tortious acts could not themselves be classified as 'commercial' in any sense. Lacking a prior commercial agreement binding on the government, they took effect simply as acts of government and thus, one would have thought, attracted immunity. His Lordship sought to avoid this conclusion in the following way:

In the case of 'Marble Islands' the origin of all that happened was a simple commercial transaction by which one of the state organisations of Cuba agreed to carry sugar to

¹ [1980] 1 Lloyd's Rep. pp. 28–31, especially at p. 31 (citing, *inter alia*, *The Rose Mary*, [1953] 1 W.L.R. 246).

² At p. 29.

³ At p. 31.

Chile and deliver it to the Chilean importers. The Cuban government induced its state organisation to repudiate that contract and ordered it to carry the sugar to North Vietnam. The Cuban government then bought the vessel and, by its conduct, adopted the repudiation as its own. It continued the repudiative act and went on to carry the sugar to North Vietnam and handed it to the people there. The nature of the transaction was again the repudiation of a purely commercial obligation. Its purpose was two-fold—to show its hostility to Chile and to help the people of Vietnam. But the purpose does not matter. The act by its very nature was an act of repudiating a binding commercial obligation. Such an act does not give rise to sovereign immunity.¹

It is submitted, with respect, that this will not do. To say that the Cuban government (as distinct from Mambisa²) induced a breach of contract, or adopted Mambisa's repudiation as its own, is to avoid the issue. The only acts performed by the government were acts *iure imperii*: its liabilities could only result from the nature of those acts. To say that a commercial transaction was repudiated is to obscure the point that it was not a transaction with the government. Of course, a foreign government might by novation or guarantee assume commercial responsibility for a contract with one of its instrumentalities, in which case its lack of immunity would flow from the commercial act of novation or guarantee. But here, no less than in *Uganda Holdings*,³ the act by which the government assumed liability (to the extent that it did so at all) was itself obviously a non-commercial one.

It is suggested that, even if one supports (as the present writer does) the proposition that a foreign government cannot escape liability for a commercial transaction with itself by repudiating it by an act of policy,⁴ the Cuban government should still have been held entitled to immunity in respect of the *Marble Islands*. (It is likely that the same conclusion would be reached under the State Immunity Act 1978.⁵)

One further, factual, difficulty with Lord Denning's conclusion is his finding that the Cuban government as owner of the *Playa Larga* was party to the bill of lading. Since the two bills of lading were apparently in much the same terms,⁶ it ought to follow that the Liechtenstein corporation as owner was party to the bill of lading in respect of its ship *Marble Islands*. But this cannot have been intended.⁷ On this hypothesis it is highly likely that the term 'owner' in the two bills of lading was intended to refer to Mambisa as operator and charterer. In that case the above reasoning would apply equally to defeat both claims, unless Lord Denning's second argument, that a government in effect waives immunity by allowing its ship to be used in commerce, and that the waiver extends even to acts *iure imperii* of that government in

¹ At p. 31.

² On the separateness of State trading instrumentalities for purposes such as these cf. *C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex*, [1979] A.C. 351, and Award (*supra*, p. 224 n. 3), p. 68.

³ *Supra*, Case No. 2.
⁴ The proposition is stated rather baldly. For a possible refinement see this *Year Book*, 49 (1978), pp. 264–5.

⁵ *Ibid.*, at pp. 265–6.

⁶ See Arbitral Award, (*supra*, p. 224 n. 3), para. 26.

⁷ The bill of lading for the *Marble Islands* is set out as Appendix IV to the Award. The reference to 'the owner of the . . . ship', on which Lord Denning relied, is part of the printed form. But the bill is on its face entered into by Mambisa, and in the charterparty between Cubazucar and Mambisa in respect of the *Marble Islands* (entered into three months earlier and also set out in Appendix IV to the Award), Mambisa is stated to be 'Disponent Owners of the good Ship'. The word 'disponent' seems to have been omitted from the charterparty for the *Playa Larga* (see para. 25 of the Award). In the absence of evidence that the Cuban government was an undisclosed principal acting through Mambisa as agent (an unlikely situation in a transaction initially between two Cuban instrumentalities), it is most doubtful whether the printed term 'owner' in the *Playa Larga* bill of lading is sufficient to make the government a party.

relation to the ship, is correct. Although this may be the position under the 1978 Act, the matter is far from clear:¹ at common law it is even more obscure. When a foreign government owns a ship, its powers of ownership, no less than of sovereignty, present the standing possibility of a diversion to strict governmental as distinct from commercial purposes.² In the absence of contract, other parties may perhaps be expected to accept that risk in dealing with government-owned ships. On the other hand there is no trace of this approach in the 1926 Brussels Convention.³ It is to be hoped that the question will receive explicit and distinct consideration in the House of Lords.

On the other hand, Waller L.J. agreed substantially with Goff J. in restricting the restrictive doctrine of immunity. Like Lord Denning, but for quite different reasons, he drew no distinction between the contractual and tortious claims. He said:

one way of posing the question is to ask whether the state has acted in exercise of its sovereign authority or as a private person . . . [T]he Republic of Cuba clearly has an interest in being free to perform political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts . . .

In my opinion in this case it was the act of the government of the Republic of Cuba which prevented these cargoes from being delivered. I do not think it is possible to say that the act was clearly commercial in its nature . . . It was not like the case of *Trendtex Trading Corporation v. Central Bank of Nigeria* . . . where there was a cancellation of contracts because too much had been ordered. No suggestion has been made that it was in the commercial interests of the Republic of Cuba to cease trading with Chile. On the contrary, it was a political decision, a foreign policy decision which bore no relation to commercial interests. The dispute would bring into question 'Legislative or international transactions of a foreign government, or the policy of its executive' (see *per* Lord Denning in *Rahimtoola*). I am of opinion therefore that subject to certain subsidiary points with which I must deal the Republic of Cuba is entitled to claim sovereign immunity in these two cases.⁴

The contrast between the two views is thus presented starkly, perhaps more starkly than is warranted. Whether the House of Lords takes a more refined view, or adopts as the common law rule a more extensive immunity than that which now applies in both the United States and the United Kingdom, remains to be seen.

Statute—relation to international convention—need for ambiguity—relevance of reference to convention in preamble

Case No. 5. *Joyce v. Joyce & O'Hare*, [1979] 2 W.L.R. 770, Lane J.

Case No. 6. *Quazi v. Quazi*, [1979] 3 W.L.R. 833, H.L., reversing [1979] 3 W.L.R. 403, C.A. Although the relation of the common law to general international law, discussed in the three preceding notes, is of greater theoretical importance, in practice the most common contact of common-law courts with international legal issues occurs in the process of interpreting statutes implementing international conventions. There is little doubt that the frequency of such contact will continue to increase,⁵ but important questions of the uses to which the international convention can be put in the interpretation of the statute are by no means settled. The diversity of approaches to

¹ The State Immunity Act 1978, s. 10 (2), requires only that the ship should have been 'in use or intended for use for commercial purposes' when the cause of action arose. Cf. this *Year Book*, 49 (1978), p. 266.

² Cf. *The Canadian Conqueror*, [1962] Canada L.R. 598; this *Year Book*, 38 (1962-3), pp. 473-4.

³ As Lord Denning pointed out: [1980] 1 Lloyd's Rep. at p. 29.

⁴ At pp. 35-6.

⁵ For a review see this writer, *American Journal of International Law*, 73 (1979), pp. 628-46.

the problem is to some extent demonstrated by these two cases, both concerned with the Recognition of Divorces and Legal Separations Act 1971, implementing the Hague Convention on Recognition of Divorces and Legal Separations of 1970.¹ Both cases involved opposition by the wife to the recognition of a divorce obtained overseas by the husband: in both, the reason for such opposition was that if the foreign divorce were recognized, no English court had jurisdiction to deal with assets of the marriage in England under the Matrimonial Causes Act 1973. For present purposes, however, their importance relates only to the extent to which the courts were able to derive interpretative assistance from the Hague Convention.

In *Joyce v. Joyce & O'Hare*, the husband obtained a divorce in Canada in circumstances such that the wife, despite her best efforts, was unable to present her case or oppose the divorce. This raised the question whether recognition might be denied either under section 8 (2) (a) (ii) of the 1971 Act, on the ground that the divorce was obtained 'without the other spouse having been given . . . such opportunity to take part in the proceedings as . . . he should reasonably have been given', or under section 8 (2) (b) on the ground that recognition 'would manifestly be contrary to public policy'. Lane J. pointed out that the 1971 Act referred to the Convention in its preamble. She said:

We know from the preamble that it was intended by Parliament to give effect to that Convention. It is therefore right and proper to look at the Convention and particularly at articles 7 to 10. Those articles of the Convention were referred to the Law Commission which in its report No. 34 . . . gave them their consideration. What consideration they gave and what they wrote in their report is there to be seen. I do not propose to read it. Speaking for myself, I entertain some doubt as to the wisdom of looking at reports of the Law Commission when construing a statute. Parliament in passing the statute may or may not have accepted wholly or in part the views of the commission, and it seems to me that it is for Parliament to express its intention.²

The Convention equivalent of section 8 (2) (a) (ii) is Article 8, which permits non-recognition *inter alia* if a respondent 'was not afforded a sufficient opportunity to present his case'. This language is perhaps less explicit than section 8 (2) (a) (ii) of the Act: in the event Lane J. refused recognition on the basis (no doubt consistent with Article 8) that 'the opportunity to [take part in the proceedings] must be wider than mere ability to take part in the formalities; it must be an effective opportunity'.³ The only specific use which she made of the Convention was a reference to its purpose, and the mischief of the Act, in preventing limping marriages,⁴ a consideration which, if anything, militated against the conclusion she reached in refusing recognition.⁵

The second case, *Quazi v. Quazi*, involved issues of much greater difficulty. For present purposes, the significant issue was the meaning of the term 'judicial or other proceedings' in section 2 (a) of the 1971 Act.

The parties were Pakistani nationals: at the relevant time the wife was not habitually resident in England. While she was an unwelcome visitor at her husband's home in Wimbledon, the husband returned to Pakistan and performed a *talaq* divorce in accordance with the law of Pakistan. The relevant Ordinance postponed the validity of a *talaq* divorce for ninety days pending official conciliation proceedings. Notice in

¹ Cmnd. 6248; *United Kingdom Treaty Series*, No. 123 (1975).

² [1979] 2 W.L.R. 770 at pp. 783-4.

³ At p. 785.

⁴ At p. 784.

⁵ The public policy ground was also, summarily, relied on: at p. 788 (and cf. Art. 10 of the Convention).

writing of the *talaq* had to be given to the Chairman of the local administrative body, whose duty it was to convene the conciliation council, and to the wife. However, if the conciliation proceedings were unsuccessful (and there was no obligation on either party to attend or co-operate), the *talaq* took effect, *proprio vigore*, at the end of the ninety-day period.

Section 2 of the 1971 Act provides for the recognition of overseas divorces 'obtained by means of judicial or other proceedings in any country outside the British Isles' and effective under the law of that country, provided the requirements of section 3 are complied with (as they were here). The sole obstacle to recognition of this *talaq* under section 2 was the argument (upheld by the Court of Appeal) that the Pakistan divorce was not 'other proceedings' within section 2 (a). The crucial reasoning in the Court of Appeal was as follows:

The preamble to the Act mentions The Hague Convention of 1968 and states that the Act was passed with a view to the ratification of the Convention by the United Kingdom. Reference may, therefore, be made to the terms of the Convention. Article 1 is in these terms:

'The present Convention shall apply to the recognition in one contracting state of divorces and legal separations obtained in another contracting state which follow judicial or other proceedings officially recognised in that state and which are legally effective there.'

We have already drawn attention to the difference in the area of application of the Convention and of the Act. Article 1 poses a question which permits of a fairly simple answer. A divorce is entitled to recognition if it followed judicial or other proceedings officially recognised by the relevant contracting state. The Act, however, is not limited in its operation to the contracting states: its scope is quite general. Moreover, the important words 'officially recognised in that state . . .' do not appear in section 2, and there is no alternative qualification to the words 'other proceedings.' This means that it is for this court itself to determine whether an overseas divorce has been obtained by means of 'judicial or other proceedings' within the section.

The inclusion of these words must be intended as a limitation on the scope of the section. If they were omitted, the only relevant question would be, 'Is the divorce effective under the relevant law?' Some forms of divorce must, therefore, be excluded, and the filter is the phrase 'judicial or other proceedings.' In our judgment, the phrase must be intended to exclude those divorces which depend for their legal efficacy solely on the act or acts of the parties to the marriage or of one of them. In such cases, although certain formalities or procedures have to be complied with, there is nothing which can properly be regarded as 'proceedings.' We think that, given the apposition of the words 'other proceedings' to the word 'judicial', 'proceedings' here means that the efficacy of the divorce depends in some way on the authority of the state expressed in a formal manner, as provided for by the law of the state. To put it in other words, the state or some official organisation recognised by the state must play some part in the divorce process at least to the extent that, in proper cases, it can prevent the wishes of the parties or one of them, as the case may be, from dissolving the marriage tie as of right.¹

The argument thus seems to have been that, although reference to the Convention was permissible without qualification, the Convention was not in fact relevant on this point because of the difference in wording between Article 1 and section 2. The House of Lords thought otherwise, although their reasoning on the point was somewhat divergent.

¹ [1979] 3 W.L.R. at pp. 408-9 *per* Ormrod L.J. (delivering the judgment of the Court).

Lord Diplock, for example, said:

The purpose for which the Recognition Act was passed is declared by the preamble to be with a view to the ratification by the United Kingdom of the Recognition Convention and for other purposes. Where Parliament passes an Act amending the domestic law of the United Kingdom in order to enable this country to ratify an international treaty and thereby assume towards other states that are parties to the treaty an obligation in international law to observe its terms, it is a legitimate aid to the construction of any provisions of the Act that are ambiguous or vague to have recourse to the terms of the treaty in order to see what was the obligation in international law that Parliament intended that this country should be enabled to assume. The ambiguity or obscurity is to be resolved in favour of that meaning that is consistent with the provisions of the treaty.

My Lords, the presumption is that the draftsman of the Recognition Act, by his use of the phrase 'obtained by means of judicial or other proceedings in any country outside the British Isles', intended to provide for the recognition of all divorces to which the recognition Convention applies, for to fail to do so would be a breach of that Convention by this country. The ordinary meaning of the phrase he used is amply wide enough to cover at least them.¹

Lord Salmon, on the other hand, derived little assistance from the preamble to the Act, or the Convention. Having determined on the broader interpretation of 'other proceedings' on other grounds, he added:

There are six signatories to this Convention in addition to the United Kingdom. We do not know whether a divorce can be obtained in any of these six signatory states other than by judicial proceedings and officially recognised and legally effective if obtained by other proceedings. If it can be, the preamble to the Act of 1971 would certainly support my construction of section 2 of the Act of 1971.

Even if a divorce cannot be obtained in any of the signatory states save by judicial proceedings, the preamble to the Act of 1971 would not conflict with my construction of section 7. The words 'and for other purposes' in the preamble show that the purpose of the Act was not solely to facilitate the recognition in the U.K. of overseas divorces obtained in the territories of the states signatory to the Convention.

Moreover, it may well be that when the Convention was registered, it was considered that amongst the states which would sign and ratify it, there might be some like Pakistan in which divorces and legal separations were officially recognised and legally effective although they had not been obtained by judicial proceedings.²

This somewhat reserved view contrasts with that of Lords Fraser and Scarman. Lord Fraser said:

... the words 'other proceedings' in section 2 (a) must mean proceedings that are not judicial, otherwise they would add nothing to what has gone before, and I see no indication in the section that they are to be limited to quasi-judicial proceedings. The words occur also in article 1 of the Hague Convention of 1970 on the Recognition of Divorces and Legal Separations, and, as the Act of 1971 was passed with a view *inter alia* to the ratification of the Convention, it is legitimate to look at it as an aid to construing the Act. Article 1 of the Convention provides that it is to apply to the recognition of divorces etc. obtained in another contracting state which follow 'judicial or other proceedings *officially recognised in that state* and which are legally effective there.' The words I have italicised do not appear in section 2 of the Act, probably because they were considered to be unnecessary; proceedings cannot be legally effective unless they are officially recognised. But they do in my opinion emphasise that the only limitation on the nature of other proceedings to which the Convention and the Act are intended to apply is that they shall be legally effective in the country where they are taken.³

¹ At pp. 839-40.

² At pp. 843-4.

³ At p. 845.

Lord Scarman said:

When the statute is examined in detail, the view that the common law is no guide to the true interpretation of section 2 of the Act of 1971 is reinforced. The Act, as its long title declares, was 'to amend the law relating to the recognition of divorces and legal separations'. One of the purposes for which it was enacted was, as its preamble recites, the 'ratification by the United Kingdom' of the Hague Convention dated June 1, 1970, on the Recognition of Divorces and Legal Separations. The true metewand for determining the meaning of the code of recognition introduced by the Act of 1971 is, therefore, not the common law but the Hague Convention (in both its authentic texts, French and English).

Mr. Jackson, with his usual and engaging candour, conceded that, if reference be made to the Convention for the purpose of interpreting the statute, he was in great difficulties. I would go further and simply say: 'Cedit quaestio'. The language of article 1 in its English text (and the French is even clearer) puts the issue beyond doubt.

The Convention's formulation is such that it cannot be limited by the *ejusdem generis* rule or any other restrictive rule of interpretation to proceedings of the state. If the proceedings which precede the obtaining of the divorce are officially recognised and the divorce thereby obtained is legally effective in the state where it is obtained, article 1 provides that the Convention applies. The only requirement is a proceeding, or proceedings (for there is no magic in the singular or the plural), officially recognised resulting in a divorce which is effective under the country's law . . .

A legislative purpose of the Act of 1971 being to enable the Convention to be ratified by the United Kingdom, there is no room for the sort of restriction for which Mr. Jackson contends, whether it be based upon the pre-existing common law or upon an *ejusdem generis* interpretation of the phrase 'other proceedings' in section 2 of the Act.¹

In the two cases, no less than three distinct views can be discerned as to the propriety of reference to conventions in interpreting statutes. The first view, adopted by Lane J. in *Joyce's* case and by the Court of Appeal in *Quazi v. Quazi*, lays emphasis on the reference to the convention in the Act: no separate requirement of ambiguity or vagueness is stipulated.² The second view, which only Lord Diplock clearly adopted, is the old requirement of 'ambiguity', otherwise known as the rule in *Ellerman Lines v. Murray*.³ The third view, adopted by Lord Fraser and even more emphatically by Lord Scarman, simply requires that the Act be passed 'with a view' to implementing the convention, without any intermediate requirements of ambiguity or uncertainty. To be sure, it would be wrong to place too much emphasis on these differences here, in view of the obvious difficulty of the issue at stake. None the less, a similar divergence of opinion occurred in the House of Lords in the *Babco* case,⁴ where the 'ambiguity' requirement survived narrowly, despite express disavowal by Lord Wilberforce. Perhaps the courts are working towards allowing reference to conventions *either* where the convention is expressly referred to in the Act *or* where the statute is ambiguous or obscure. If so, the 'ambiguity' test is likely to become obsolete, since modern practice is to refer to the relevant convention in the implementing Act.⁵ But the 'ambiguity' test is analytically unsatisfactory and question-begging; it sets up an artificial and unnecessary intermediate issue capable of provoking judicial disagreement but not intrinsically related to the issues at stake, and it is only appropriate (if at all) to *one* of

¹ At pp. 852-3. Viscount Dilhorne agreed in general terms with both Lords Diplock and Scarman (at p. 841).

² Whether Lord Salmon was denying the relevance of the preamble altogether, or simply found it unhelpful in this particular case, is unclear.

³ [1931] A.C. 126.

⁴ [1978] A.C. 141; this *Year Book*, 49 (1978), pp. 274-9.

⁵ Cf. *loc. cit.* (*supra*, p. 227 n. 5), p. 631.

the two presumptions of interpretation in this field.¹ It therefore seems an excessive refinement. This being so, it is perhaps significant that, of the ten judges in these two cases,² only one expressly referred to or relied upon it.

However, on the precise point involved in *Quazi v. Quazi* it may be that Article 1 of the Convention was not as clear in covering this form of divorce as some of their Lordships thought. The application of Article 1 to unilateral and consensual divorces was in fact extensively discussed during the debates of the Commissions of the Hague Conference charged with preparing the text of the Convention. The United Kingdom consistently argued for a clarification or extension of Article 1, so as to include all forms of divorce.³ A British amendment to extend the Convention to 'divorces and legal separations obtained in a contracting State in accordance with its internal law . . . whatever the forms or methods of divorce which the State provides or permits' was rejected by 6 votes to 15.⁴ During the debate, the Egyptian delegate suggested that the administrative registration of a *talaq* was sufficient to bring it within the existing Article 1,⁵ though another delegate doubted this.⁶ The Chairman (Professor Graveson), with the Rapporteur's agreement, explained the term 'proceedings' (which did not appear in the United Kingdom amendment) as requiring 'some kind of action before authorities taken by the parties'.⁷ Mere registration was not enough. Article 1 was adopted without amendment. The Explanatory Report accompanying the Convention makes it quite clear that a wholly unofficial divorce such as a classical *talaq* is excluded from recognition by Article 1: on the extent of official intervention required to bring such a divorce within Article 1 the Report is equivocal.⁸ In the light of this drafting history it is extraordinary that the United Kingdom Government, which had expressed a clear view as to the desirable extent of the Convention, should choose to draft legislation which left out the words 'officially recognized in that State' from section 2, without making it clear precisely what was intended on this point.⁹ Since the entire litigation here was legally aided, it was also an expensive omission.

European Convention on Human Rights—relevance in determining the common law—whether telephone tapping authorized by Secretary of State illegal

Case No. 7. *Malone v. Metropolitan Police Commissioner* (No. 2), [1979] 1 Ch. 344; [1979] 2 W.L.R. 700, Megarry V.C. In a series of cases,¹⁰ British courts have referred to the European Convention on Human Rights in interpreting statutes, and the propriety of such reference (at least when the statute was passed after United Kingdom

¹ *Sc.* the presumption of consistency between the convention and the implementing statute. The other presumption is that a statute will not be interpreted as violating international law (including an international obligation imposed by a treaty). The distinction between the two is not always carefully observed.

² Including Wood J. at first instance in *Quazi v. Quazi* (14 July 1978, unreported: see [1979] 2 W.L.R. at p. 784).

³ Hague Conference on Private International Law, *Actes et documents de la Onzième session, 7 au 26 octobre 1968* (The Hague, 1970), vol. 2, pp. 32, 83.

⁴ *Ibid.*, p. 94; for discussion see pp. 99–102.

⁵ *Ibid.*, p. 99, and cf. p. 105 for his comments on a proposed conciliation procedure similar to that under the Pakistan Ordinance.

⁶ *Ibid.*, p. 100.

⁷ *Ibid.*, p. 101.

⁸ *Ibid.*, p. 212 (Bellet/Goldman).

⁹ No reference seems to have been made to the *travaux préparatoires* in argument in *Quazi v. Quazi*. Whether such reference would have been permissible is of course doubtful: see *infra*, Case No. 8.

¹⁰ Noted in this *Year Book*, 47 (1974–5), pp. 356–61; 48 (1976–7), pp. 348–52; 49 (1978), pp. 270–4.

ratification of the Convention) is now established. On the other hand, in a surprising number of cases litigants have attempted to rely directly and substantively on the Convention's provisions, in virtually every case without success.¹ The real issue here was whether reference to the Convention in determining a problem of *common law* rather than statutory interpretation fell into the former or the latter category. It thus raised a fundamental issue of common law method.

Malone had reason to believe his telephone was being tapped by the Post Office pursuant to a warrant of the Secretary of State and at the request and for the crime-detection purposes of the Commissioner.² He sought, in the end, declarations that such tapping was illegal, and to this end relied on the Convention in three distinct ways.

His first Convention argument, quite clearly based on direct reliance, was that the Court had jurisdiction (under R.S.C. Ord. 15, r. 16) to give a 'merely declaratory judgment' as to the illegality of telephone tapping under Article 8 of the Convention. The argument may have been novel, but it was firmly rejected:

Mr. Ross-Munro's contention was that this wording was very wide, and enabled the court to make declarations not only as to legal rights, but also as to moral or international obligations. Further, the Convention was unlike an ordinary treaty, since it gave individuals the right to petition the Commission established under the Convention in respect of alleged breaches of the terms of the Convention . . . The short answer to Mr. Ross-Munro on the present point is that declarations will be made only in respect of matters justiciable in the courts; treaties are not justiciable in this way; the Convention is a treaty with nothing in it that takes it out of that category for this purpose; and I therefore have no power to make the declaration claimed under paragraph 4 of the prayer for relief in the statement of claim. Even if I had jurisdiction, I think that in my discretion I would refuse to make the declaration, and would leave it to the bodies set up under the Convention to decide the matter. Accordingly, I refuse to make that declaration, and dismiss the claim to it.³

Secondly, and a little more subtly, a declaration was sought (in terms of Article 26 of the Convention) that there was no domestic remedy for the telephone tapping. Sir Robert Megarry said:

When I inquired of Mr. Ross-Munro what good a formal declaration would do him before the Commission of Human Rights and the court established under the Convention that would not be done by a reasoned judgment on the main issues (which might, indeed, be more illuminating than a formal declaration), he was unable to point to anything . . . In those circumstances, and bearing in mind that declarations are discretionary remedies, I shall make no formal declarations under paragraphs 3 and 5. Even if I have jurisdiction to make them (and I very much doubt this as to paragraph 5), I do not think that the court should make useless declarations, especially when the object in seeking them seems to be to support some contention under a treaty over which the court has no jurisdiction.⁴

In fact, however, he did go on to make it quite clear that, in his view, no such local remedy exists, and that English law in this respect does fall short of the Convention

¹ See especially *ex parte Salamat Bibi*, [1976] 1 W.L.R. 879, and for a reserved account, House of Lords, *Report of the Select Committee on a Bill of Rights* (1978, H.L. paper No. 176), pp. 27-9.

² The procedure for authorizing such tapping is purely administrative, viz. that recommended by the Birkett Report of 1957 (Cmnd. 283).

³ [1979] 1 Ch. at pp. 352, 354. Cf. also at p. 378.

⁴ At p. 355.

standards. After referring to the provisions of the West German law upheld by the European Court in the *Klass* case,¹ he said:

Not a single one of these safeguards is to be found as a matter of established law in England, and only a few corresponding provisions exist as a matter of administrative procedure.

It does not, of course, follow that a system with fewer or different safeguards will fail to satisfy article 8 in the eyes of the European Court of Human Rights. At the same time, it is impossible to read the judgment in the *Klass* case without its becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that court, whatever administrative provisions there may be . . . In this respect English law compares most unfavourably with West German law: this is not a subject on which it is possible to feel any pride in English law.²

The third, and most hopeful, argument was that the Convention could be referred to as a source of standards or policy by a court in determining what the common law is or should be (where it is not already authoritatively determined). Reliance was placed on Scarman L.J.'s *dictum* in the *Pan-American* case,³ allowing reference to international instruments and obligations, not merely in the construction of statutes but also in the formulation of legal principles.⁴ Sir Robert Megarry referred to Roskill L.J.'s disapproval of this *dictum* in *Salamat Bibi*⁵ and added:

It is not for me, sitting at first instance, to resolve the variant shades of meaning in the dicta, and I do not attempt to do so. For the present, all that I say is that I take note of the Convention, as construed in the *Klass* case, and I shall give it due consideration in discussing English law on the point. As for the direct right which the Convention confers, it seems to me to be plain that this is a direct right in relation to the European Commission of Human Rights and the European Court of Human Rights, the bodies established by the Convention, but not in relation to the courts of this country. The Convention is plainly not of itself law in this country, however much it may fall to be considered as indicating what the law of this country should be, or should be construed as being.⁶

But, however relevant the Convention might be in this way, Malone's problem (once the orthodox common law sources and analogies pointing to the general illegality of telephone tapping had been exhausted or dismissed⁷) was that in his case what the Convention required was not the prohibition of any tapping at all but its conduct under proper safeguards. But it is precisely in the area of safeguards, administrative machinery and the like that the common law (and 'customary' law-making generally) is at its weakest. The point was made with some precision:

I . . . find it impossible to see how English law could be said to satisfy the requirements of the Convention, as interpreted in the *Klass* case, unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes. It may perhaps be that the common law is sufficiently fertile to achieve what is required by the first limb of this; possible ways of expressing such a rule may be seen in what I have already said. But I

¹ European Court of Human Rights, Judgment of 6 September 1978: noted by D. J. Harris, this *Year Book*, 49 (1978), pp. 311-15.

² [1979] 1 Ch. at pp. 379-80.

³ [1976] 1 Lloyd's Rep. 257 at p. 261.

⁴ [1979] 1 Ch. at p. 365.

⁵ [1976] 1 W.L.R. at p. 986.

⁶ [1979] 1 Ch. at p. 366.

⁷ For Megarry V.C.'s meticulously orthodox analysis of the issues of privacy and confidentiality see *ibid.* at pp. 355-62.

see the greatest difficulty in the common law framing the safeguards required by the second limb. Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject matter, the greater the difficulty in the court doing what it is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.

It appears to me that to decide this case in the way that Mr. Ross-Munro seeks would carry me far beyond any possible function of the Convention as influencing English law that has ever been suggested; and it would be most undesirable. Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the *Klass* case can, I think, play any proper part in deciding the issue before me.¹

So in the event one problem of method ousted another: we shall have to wait for a more appropriate case to see whether the Convention will assume anything but a wholly subsidiary role in the common-law-making process. But the 'myth' (in the strict sense) of the declaratory theory dies hard. It is by no means clear that the courts can properly refer to *statutes* as a source of analogies or principles for the common law;² there must be at least as much doubt about reference to international instruments. The chief value of the present case, in this context, may well be its assistance to Malone in proceedings before the European Commission and Court, and its stimulus (direct or via such Convention proceedings) to much-needed legislation on the topic.³

¹ At p. 380.

² Cf. *Malone v. Commissioner of Police of the Metropolis*, [1979] 1 All E.R. 256, *per* Stephenson L.J. at p. 266 (a search and seizure case).

³ In the period under review, reference was also made to the European Convention in the following cases. In *R. v. Board of Visitors of Hull Prison, ex parte St. Germain (No. 2)*, [1979] 1 Q.B. 425 (C.A.), counsel for the Board of Visitors referred to the practice of the European Commission in the matter of internal disciplinary proceedings in a prison (at pp. 435-6; in reply, see p. 437). Only Waller L.J. referred to the point: he cited the United Kingdom argument before the Commission to support the view that the Board was an independent and impartial authority, against which, he thus concluded, certiorari could go (at pp. 464-5). In *Associated Newspapers Group Ltd. v. Wade*, [1979] 1 W.L.R. 597 at pp. 708-9, Lord Denning M.R. referred to Art. 10 of the Convention in support of an asserted 'fundamental principle of our law that the press shall be free'. While agreeing in the result, Lawton and Geoffrey Lane L.JJ. carefully made no reference to the point. Similarly, in *Advisory, Conciliation & Arbitration Service v. U.K. Association of Professional Engineers*, [1979] I.R.L.R. 68, Lord Denning alone referred to Art. 11 of the Convention, which in his view . . .

'only states a basic principle of English law . . . [W]hen Parliament enacts legislation on trade unions, it must be taken not to intend to contravene that basic right . . .' (at p. 71).

In *R. v. Lemon*, [1979] 2 W.L.R. 281, Lord Scarman referred to Arts. 9 and 10 of the Convention to support the view that an intent to blaspheme is not necessary for the offence of publishing a blasphemous libel: see pp. 308-9, 315. In *Minister of Home Affairs v. Fisher*, [1979] 2 W.L.R. 889, the Privy Council had to construe the term 'child' in a human rights provision of the Bermuda Constitution. Their Lordships referred to the European Convention and the Universal Declaration as the antecedents of Part I of the Constitution (providing for 'Protection of Fundamental Rights and Freedoms of the Individual'), and emphasized that these called 'for a generous

Statute—relation to international convention—interpretation—relevance and admissibility of travaux préparatoires

Case No. 8. Fothergill v. Monarch Airlines Ltd., [1979] 3 W.L.R. 491, C.A. The decision of Kerr J. at first instance in this case was noted in the last volume of this *Year Book*.¹ The issue was whether the term 'damage' in Article 26 (2) of the amended Warsaw Convention² included loss of part of the contents of a suitcase so as to require notification of the loss within seven days. (The suitcase was itself damaged, and that damage duly notified, but if the seven-day limitation applied the notification of the loss of contents was out of time.) Kerr J. held that the word 'damage' did not include partial loss of contents in its ordinary English meaning, and that the contrary meaning, suggested by the *travaux préparatoires* of the Hague Conference in 1955, should not be preferred because it would lead to an 'unfair and illegitimate interpretation under our rules of construction'.³

interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to' (p. 894). They held that the relevant provision amounted to a . . .

'clear recognition of the unity of the family as a group and acceptance of the principle that young children should not be separated from a group which as a whole belongs to Bermuda. This would be fully in line with article 8 of the European Convention on Human Rights and Fundamental Freedoms (respect for family life), decisions on which have recognised the family unit and the right to protection of illegitimate children. Moreover the draftsman of the Constitution must have had in mind (a) the United Nations' Declaration of the Rights of the Child adopted by resolution (1386 (xiv)) on November 29, 1959, which contains the words in principle 6:

"[the child] shall, wherever possible, grow up in the care and under the responsibility of his parents . . . a child of tender years shall not, save in exceptional circumstances, be separated from his mother."

and (b) article 24 of the International Covenant on Civil and Political Rights 1966 which guarantees protection to every child without any discrimination as to birth. Though these instruments at the date of the Constitution had no legal force, they can certainly not be disregarded as influences upon legislative policy' (p. 896).

In *Gleaves v. Deakin*, [1979] 2 W.L.R. 665 (H.L.), Lord Diplock (with whose observations Lord Keith agreed) pointed out the incompatibility of the common law offence of criminal libel in the case of a private prosecution with Article 10 of the European Convention, and advocated corresponding reforms: see pp. 667-8. On the other hand in a number of cases direct reliance on the Convention was held to be misconceived: see *Patel v. University of Bradford Senate*, [1979] 1 W.L.R. 1066 (C.A.) at p. 1070, *per* Orr L.J. (holding not that the Convention was irrelevant but that nothing in it had been 'in any way contravened in this case'), *Mutasa v. Attorney-General*, [1979] 3 W.L.R. 792 (Boreham J.) at pp. 795-6, and *Science Research Council v. Nasse*, [1979] 3 W.L.R. 762 (H.L.). In this last case, Lord Wilberforce said (at p. 772):

'Article 6 (1) of the convention guarantees the right to a fair hearing: the appellant relies on this as requiring total disclosure of all information relevant to the case, confidential or not. But this is a fallacy, because the whole aim and object of those carefully worked out provisions of English law which regulate the right to discovery and inspection of documents is precisely to achieve a fair hearing. That is the standard of our law and it is unnecessary to have resort to the convention to establish it.'

An unreported case involving attempted direct reliance on the Convention was *Uppal v. Home Office* (Megarry V.C., 20 October, 1978: see [1979] 1 Ch. at p. 353; appeal dismissed by consent, 2 November 1978: see Revised Judgment (transcript) at p. 2 *per* Roskill L.J.). Megarry V.C.'s decision will be noted in the next volume of this *Year Book*.

¹ [1978] Q.B. 108; this *Year Book*, 49 (1978), pp. 267-70.

² Cmd. 9824 (1955).

³ [1978] Q.B. at p. 119.

Before the case came on for appeal, Parliament passed the Carriage by Air and Road Act 1979, section 2 of which provides:

(1) In the Carriage by Air Act 1961, after section 4 there shall be inserted the following section—

Notice of partial loss

4A—(1) In Article 26 (2) the references to damage shall be construed as including loss of part of the baggage or cargo in question and the reference to the receipt of baggage or cargo shall, in relation to loss of part of it, be construed as receipt of the remainder of it.

(2) It is hereby declared, without prejudice to the operation of any other section of this Act, that the reference to Article 26 (2) in the preceding subsection is to Article 26 (2) as set out in Part I and Part II of the First Schedule in this Act.

(2) This section shall come into force at the passing of this Act but shall not apply to loss which occurred before the passing of this Act.

The *ratio* of Kerr J.'s judgment was thus in effect overruled, but prospectively only. Section 2 presented something of a dilemma: on the one hand, Parliament is presumed to comply with the international obligations of the United Kingdom, and new section 4A of the 1961 Act ought to be taken as a statement of the proper interpretation of Article 26 (2) rather than a unilateral derogation from it; on the other, it was stated to be prospective only. It was in a semi-declaratory form, but was stated in the long title and the sidenote to section 2 to be a 'modification of article 26 (2)'. Faced with this dilemma the majority of the Court of Appeal (Browne and Geoffrey Lane L.JJ., the latter more hesitantly) gave priority to section 2 (2) and regarded the amendment as irrelevant to the question before them.¹ Lord Denning disagreed:

Seeing that the section is in force, we can look at it. It shows plainly what the government thought was the meaning of article 26 (2) of the Convention. They realised that it was their duty to implement it—so as to be in conformity with all the other signatories. It was therefore enacted that, for future losses, the courts of England were to construe article 26 (2) by holding that 'damage' included 'partial loss'.

So interpreted, the new section seems to me to be a declaration by Parliament of the meaning of article 26 (2) of the Convention—the meaning which it was intended to have by the signatories of the Convention—the meaning which it was intended to have in 1929 and in 1956 when the Convention and the amended Convention were signed. It is therefore to be considered as a declaratory Act—declaring what the true meaning of the Convention was, and is, and is to be.²

From the point of view of general principle, perhaps the more important issue in the case was the question whether reference might be had to the *travaux préparatoires* of the Hague Protocol of 1955 in interpreting the Convention. At the Hague Conference a proposal to amend the Convention to make it clear that the word 'damage' in Article 26 (2) included partial loss had been withdrawn as unnecessary. Kerr J. had held the *travaux* admissible in principle, though in the end he refused to adopt the meaning they suggested. It is possible to detect in the Court of Appeal judgments three distinct approaches to the question.

Not unexpectedly, the most forthright was that of Lord Denning. He pointed out that many foreign courts and the International Court refer to *travaux préparatoires*, and concluded:

As a result, I am prepared to say that when the Parliament of the United Kingdom gives

¹ [1979] 3 W.L.R. at pp. 503, 507–8.

² At p. 499.

its authority to an international convention—by incorporating it into our municipal law—then the courts of this country can have regard to the travaux préparatoires so as to aid them in the interpretation of it. This was in the mind of Diplock L.J. when he said in *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740, 761, that ‘light might be thrown . . . by the travaux préparatoires of the Convention itself’. If the words are clear in themselves, there is little need to have recourse to the travaux préparatoires, though it can be done so as to confirm the meaning. But when there is any ambiguity or obscurity or anything that needs clearing up, then recourse can be had to the travaux préparatoires, so as to ascertain what was the meaning intended by the draftsmen and signatories of the Convention. These travaux préparatoires can be used not only to see what was the mischief needed to be remedied—not only to see what was the purpose or object of the draftsmen—but also to find out what they really meant to convey by the words they used . . .

Tried by these tests it seems to me that we can look at the minutes of The Hague meeting in 1955. On looking at them, it becomes clear that ‘damage’ in article 26 (2) includes ‘partial loss’.¹

Browne and Geoffrey Lane L.JJ. on the other hand gave a number of divergent reasons why the Hague Conference minutes should not be referred to in this case. Browne L.J., after referring to the orthodox English rule and to some of the *dicta* favouring reference to *travaux* in interpreting statutes implementing treaties, said:

I am far from satisfied that the United Kingdom delegation at The Hague in 1955 thought that in article 26 (2) of the original Warsaw Convention ‘damage’ included partial loss. The minutes of the 19th and 20th meetings suggest that they thought it did not, or at least that this was doubtful. Assuming that at the 33rd meeting all, or a majority, of the delegates thought it did, this was merely their opinion in 1955 about what the draftsmen of the Warsaw Convention had intended, or thought in 1929 that it was to mean. In my judgment it would be contrary to the principles stated in the House of Lords to which I have referred for us to have regard to this opinion as to the meaning of the Warsaw Convention. These minutes were not part of the ‘travaux préparatoires’ of the Warsaw Convention itself . . . It might be argued that this opinion was part of the ‘travaux préparatoires’ of The Hague Protocol, because as a result of forming that opinion the delegates decided not to amend the Warsaw Convention. But in my view it still remains merely their opinion of what the Warsaw Convention was intended or understood by its draftsmen to mean.

I think this is enough reason to hold that we should not have regard to these minutes, but there are two other considerations which I think support this conclusion. There is no evidence that these minutes were ever published in this country . . . Lord Denning M.R. views with equanimity the prospect that air passengers from this country may be bound by ‘travaux préparatoires’ of which they do not and cannot know anything, but I confess I do not; it seems to me contrary to the opinions I have quoted as to the need for the material to be available to the public (even if most people are unlikely in fact to have seen it).

Mr. Staughton cited to us a very apposite passage from Blackstone (*Blackstone's Commentaries on the Laws of England*, 8th ed. (1778), p. 45: ‘It is requisite that this resolution be notified to the people who are to obey it.’). Further, as Mr. Staughton pointed out in the course of the argument, if there is no need for publication it would be open to a party to call oral evidence from someone who was present at the negotiation of the international agreement to give evidence of what the delegates intended a provision in the agreement to mean; it would then be open to the other party to call another witness to say that that was not what was intended—and so on indefinitely. Apart from the other objections, from the practical point of view of time and expense, which I understand has been one of the factors which has influenced our courts in deciding what

¹ At pp. 497–8.

evidence should be admissible in aid of the construction of statutes, this would be intolerable . . . In my judgment we should not have regard to these minutes.¹

Geoffrey Lane L.J.'s reasoning was somewhat different. Having first concluded that the term 'damage' in its ordinary meaning did not include partial loss of contents, he said:

That being so there is no room for invoking the contents of any '*travaux préparatoires*' of the 1955 Conference which considered the amendments to be made by The Hague Protocol, because there is no true ambiguity about the words as they stand. I should have been unhappy in any event to resort to this method of interpretation for two reasons. First, because it would be difficult to limit the ambit of any such inquiry, and, secondly, because it would not be fair to the passenger or consignor. The plaintiff here was wise enough to insure his baggage. Many passengers do not. They are entitled if they so wish to rely on their rights against the carrier under the Convention. They can only ascertain those rights and any limitation upon them by reading the terms of the Convention. They do not and could not know of the existence or content of the minutes and memoranda of the 1955 Hague Conference which have been shown to us. It seems to me quite wrong that they should be adversely affected by statements made at that conference about the meaning of article 26 (2).

There may well be circumstances in which it is legitimate to have recourse to such material to discover the meaning of international conventions, but where the terms of the convention seek to regulate the contractual relationship between private individuals or between private individuals and corporate bodies it must be rarely that such evidence can properly be admissible.²

Not only is the emphasis in these passages different, but no less than five distinct reasons are given for excluding reference to the *travaux*. Their combined effect might well be to exclude such reference in all cases, contrary to the *dicta* and decisions which support it (some of which were cited).³ Moreover, Geoffrey Lane L.J.'s reasoning, in particular, is an example of the inveterate common law habit of presenting issues of weight or cogency as if they were issues of admissibility (since it was not suggested that *travaux* are in principle inadmissible). The most persuasive of the arguments is perhaps Browne L.J.'s simple point that the decision in 1955 not to amend Article 26 (2) (whether or not correct) was not an authoritative indication of the meaning of the original article, but simply a later opinion. In other words, it is not part of the *travaux* of Article 26 (2) at all. There is something in this, unless one treats the Hague Protocol of 1955 as in some way 'reenacting' the Warsaw Convention as distinct from simply amending it. The 1955 Minutes, on this view, might still have been relevant as a semi-official opinion on the interpretation of Article 26 (2), but their value would have been considerably attenuated. Geoffrey Lane L.J. agreed with Kerr J. in emphasizing the contractual nature of the Warsaw Convention regime, with the consequence that undiscoverable interpretations should not be treated as binding, or even (in his view) relevant. Again, it is possible to sympathize with this reasoning, but it would be more cogent if passengers could effectively contract out of the Warsaw system. It is perhaps preferable to treat it as a system of uniform law dependent upon notice.⁴ Moreover, such reasoning would exclude from consideration much more than *travaux préparatoires*: few passengers would have any knowledge of any of the decisional or interpretative law surrounding the Convention. If they are to rely on their (not

¹ At pp. 505-6.

² At p. 507.

³ At p. 504 *per* Browne L.J.

⁴ See G. Miller, *Liability in International Air Transport* (1977), chs. XII and XIII for an interesting discussion of the general issue. See also McGilchrist, *Lloyd's Maritime & Commercial Quarterly*, May 1979, pp. 181-5.

necessarily English) legal advisers, there is no reason why those advisers should not have regard to the *travaux préparatoires* as one of the guides to interpretation (and in many jurisdictions they do so).

The other reasons given for rejecting the Hague Minutes seem less substantial. The 'ambiguity' pre-requisite has been criticized already:¹ in particular there is something gratuitous in declaring a term as uncertain and disputed as this 'clear and unambiguous'. The fact that the Minutes were published in Montreal (by the International Civil Aviation Organization) should not have precluded their consideration in England (although the availability of *travaux* does present problems). The difficulties in restricting inquiry, and in particular the concern as to the possibility of oral evidence of *travaux*, seem exaggerated: it would be a simple matter to require that any such material be published officially and be in written form.² This is the practice in international jurisdictions.³

It is suggested that the justification for a cautious resort to the *travaux* of international conventions in these circumstances is a relatively simple and clear one. If one accepts that the most important presumption in this field is that of conformity with the international obligations of the *forum*, then it is necessary to determine exactly what those obligations are and thus to apply those techniques which are relevant to that end: it is settled that these include reference to *travaux préparatoires*. Such a requirement is *a fortiori* when the convention is directly given the force of law rather than implemented by parallel enactment: in that case, there is a clear indication that Parliament intends the convention to operate as nearly as possible in a uniform way, rather than as a form of words. In contrast, the effect of the *dicta* here is more or less to exclude reference to *travaux préparatoires* altogether. Whether that position can be maintained is doubtful.

Two subsidiary points should be mentioned. Although the French text of the Convention is stated to be authoritative,⁴ all three members of the Court were hesitant in relying on their ('schoolboy') knowledge of French here.⁵ It seems likely, despite the express statutory directive, that expert evidence will be required on any substantial question of discrepancy between the texts.

Secondly, Lord Denning, despite disagreeing with Kerr J. and the majority on the major issue, managed to agree in the result by holding that Mr. Fothergill's complaint was sufficient both as to the damage and the loss, on the basis that Article 26 (2) requires only a general, not a specific, complaint.⁶ Indeed, the appellant was in something of a cleft stick: if loss is something other than physical damage (so that complaint of the latter does not extend to the former), then there is no expressed time limit for complaint of loss. If, on the other hand, the term damage includes loss, then the customer could claim to have complained of both. Article 26 is no more specific in spelling out the nature of 'complaint' than it is of 'damage'.⁷

¹ *Supra*, p. 231.

² Cf. [1979] 3 W.L.R. at p. 498 *per* Lord Denning.

³ Cf. Vienna Convention on the Law of Treaties 1969, Art. 32.

⁴ Carriage of Goods by Air Act 1961, s. 1 (2).

⁵ [1979] 3 W.L.R. at pp. 495, 496 *per* Lord Denning M.R., 502 *per* Browne L.J., 506 *per* Geoffrey Lane L.J.

⁶ At p. 500.

⁷ Other cases involving the interpretation of treaty, or treaty-implementing, provisions in the period under review include *Rustenbergh Platinum Mines Ltd. v. South African Airways*, [1979] 1 Lloyd's Rep. 19 (C.A.) (Warsaw Convention) (and see F. A. Mann's note, *Law Quarterly Review*, 95 (1979), pp. 346-8); *Moto Vespa S.A. v. MAT (Britannia Express) Ltd.*, [1979] 1 Lloyd's Rep. 175 (Mocatta J.) (C.M.R. Convention); *Hock Heng Co. Sdn. Berhad v. Director-General of Inland Revenue*, [1979] 2 W.L.R. 783 (P.C.) (Singapore-Malaysia Double Taxation

Diplomatic immunity—loss of immunity before summons struck out—whether summons invalid ab initio—Diplomatic Privileges Act 1964—Vienna Convention on Diplomatic Relations 1961

Case No. 9. Shaw v. Shaw, [1979] Fam. 62; [1979] 3 W.L.R. 24, Balcombe J. This case raised a simple point in the law of diplomatic immunity. In December 1978, a divorce petition was issued by Mrs. Shaw against her husband, a member of the United States Mission to the United Kingdom entitled to immunity from suit. In January 1979 the husband applied to strike out the petition on the grounds of his immunity. However, before the summons came on for hearing in February, the husband had ceased to be entitled to immunity and had returned to the United States. It was argued that the petition was in some way void or defective so that the subsequent loss of immunity could not avail the wife. Reliance was placed on earlier *dicta* and decisions on the Diplomatic Privileges Act 1708 (which referred to 'writs and processes' against foreign ambassadors as 'utterly null and void to all intents and purposes whatsoever' (s. 3)). However, even under the 1708 Act civil process was held to be valid until set aside rather than void *ab initio*, a point settled by *Empson v. Smith*,¹ if not before. This was even clearer under the Diplomatic Privileges Act 1964 (which gives the force of law to relevant articles of the Vienna Convention on Diplomatic Relations).² The Convention merely exempts diplomatic agents from the 'civil and administrative jurisdiction' of the receiving State (Art. 31 (1)): that this does not require exemption from service is fairly clearly implied by Art. 32 which allows waiver of immunity. Such waiver must be express, and is an act performed *vis-à-vis* the court rather than the plaintiff.³ Accordingly, the husband's immunity having lapsed, there was no barrier to the continuance of the wife's petition.⁴

JAMES CRAWFORD

B. PRIVATE INTERNATIONAL LAW*

Service outside the jurisdiction: the location of a tort

Case No. 1. What may generally be described as the problem of locating the commission of a tort or alleged tort can arise in two different contexts in English private international law. It may arise in a jurisdictional context, for it is provided in Order 11 of the Rules of the Supreme Court that one of the cases in which service of a writ out of the jurisdiction is permissible is where 'the action begun by the writ is founded on a tort committed within the jurisdiction'.⁵ The problem may also arise in a choice of law context in that the determination of most issues relating to tort liability may involve reference to 'the law of the place' where 'the act' was 'done'.⁶ Almost all the case-law on the subject has arisen in the former jurisdictional context;⁷ but—somewhat curiously—

Convention, 1966); and *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corp. (England) Ltd.*, [1979] 1 W.L.R. 401 (C.A.) (Uniform Law on the Formation of Contracts for the International Sale of Goods, 1967).

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¹ [1965] 1 Q.B. 426 (C.A.); noted this *Year Book*, 41 (1965-6), pp. 439-40.

² *United Nations Treaty Series*, vol. 500, p. 95.

³ [1965] 1 Q.B. 426 at p. 439 *per* Diplock L.J. And see *British Digest of International Law*, vol. 7, pp. 722, 867-75. ⁴ [1979] Fam. at p. 69. ⁵ R.S.C., Ord. 11, r. 1 (1) (h).

⁶ *Phillips v. Eyre*, (1870) L.R. 6 Q.B. 1, *per* Willes J. at pp. 28-9.

⁷ English authority on the location of a tort in a choice of law context is virtually non-existent. So, too, in Commonwealth jurisdictions, although there has been considerable case-law on the

leading English writers¹ have accorded primary treatment to the subject and to this case-law when dealing with choice of law. Some point out that as a matter of authority the decided cases 'are only decisions for the purposes of Order 11'.² It is, however, important to remember that, quite apart from the authoritative significance of the case-law, the problem of locating a tort as it arises in a jurisdictional context is essentially different not only formally but also in policy terms from the problem as it may arise in a choice of law context. Appreciation of this difference has a bearing upon the way in which the problem is sensibly to be resolved in the two differing contexts.

The formal differences are clear. In the jurisdictional context the question to be answered is as to whether the alleged tort was committed in England and Wales or elsewhere. If the latter, no more specific location is called for. The answer must, however, be unambiguous in the sense that it cannot be that the tort was committed both in England and Wales and elsewhere. In the choice of law context the tort must be located specifically: it is not enough to find that it was committed elsewhere. However, in this context there is no formal reason why the defendant should not be deemed to have acted in more than one specified law district, in which case the plaintiff could presumably have the advantage.³ Moreover, it is to be noted that, whereas the investigation for the purposes of Order 11 is as to where the tort was committed, it is possible that in a choice of law context the question is still rather as to where the defendant acted. One of the many, if lesser, legacies of uncertainty left by the decision in *Boys v. Chaplin*⁴ is as to whether the reference required by the second arm of the rule in *Phillips v. Eyre*⁵ is simply to the *lex loci delicti commissi* or, despite the eclipse of the doctrine of *Machado v. Fontes*, it is still to the law of the place where the defendant acted. In a borderline case on location this difference could be relevant.

Perhaps more important than these formal differences are the differences between the policy considerations involved in locating allegedly tortious activity in the two different contexts. The determination of the place of the tort (or of the defendant's activity) in the context of choice of law ought to reflect the purposes of the rule that directs reference to the law of that place. It might be contended that the plaintiff should be allowed the advantages accorded to him by the law of any country in which one of the train of events alleged to constitute a tort occurred and with the laws of which it is reasonable to expect the defendant to have complied. The matter is primarily one of fairness between the parties. In the context of jurisdiction, however, other factors assume importance. The country of the *forum* has an inherent interest in the availability of its courts. Moreover, considerations of comity and reciprocity fall to be considered. As Scott L.J. said in *George Monro Ltd. v. American Cyanamid and Chemical Corporation*, 'Service out of the jurisdiction at the instance of a court is necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. As a matter of international comity it seems to me important to make sure that no such service shall be allowed

interpretation of provisions similar to Ord. 11, r. 1 (1) (h), authority on the location of a tort for choice of law purposes is very scanty. The problem has, however, been touched upon in a choice of law context in Scotland. See, for example, *Soutar v. Peters*, [1912] 1 S.L.T. 111; *John Walker & Sons Ltd. v. Douglas McGibbon & Co. Ltd.*, [1972] S.L.T. 128.

¹ Dicey and Morris, *The Conflict of Laws* (9th edn., 1973), pp. 968-71; Cheshire and North, *Private International Law* (10th edn., 1979), pp. 285-9; Graveson, *Conflict of Laws* (7th edn., 1974), pp. 574-7.

² Dicey and Morris, *op. cit.*, p. 971; see too, Cheshire and North, *op. cit.*, pp. 286-7.

³ See Cook, *Logical and Legal Bases of the Conflict of Laws*, p. 345.

⁴ [1971] A.C. 356.

⁵ (1870) L.R. 6 Q.B. 1.

unless it is clearly within both the letter and the spirit of R.S.C., Ord. 11.¹ Put broadly the enquiry for the purposes of Order 11 should be as to whether the defendant's activity, its consequences for the plaintiff, and all the surrounding circumstances are, when viewed as a whole, so markedly connected with England and Wales as to justify a court sitting there in assuming the power to take the exceptional step of exercising *in personam* jurisdiction over an absent defendant. It is to be remembered that a finding that an alleged tort was committed within the jurisdiction does not compel the court to allow service out of the jurisdiction: such a finding is merely a threshold requirement for the grounding of a discretion for the court to do so. Fairness between the parties in the particular circumstances is an important consideration in the exercise of that discretion, but in determining its existence it is at most only one of the factors to be taken into account.

In the recent case of *Diamond v. Bank of London and Montreal*² the Court of Appeal had occasion to review the not readily reconcilable case law on the location of a tort for the purposes of Order 11, r. 1 (1) (h). The Court there held that when fraudulent (and also negligent) misrepresentations had been made by telex and telephone calls originating outside the jurisdiction, the substance of the alleged tort was committed in England where they were received and acted upon and that accordingly it could grant leave for service out of the jurisdiction. The Court, however, went on to hold that in the exercise of the discretion thus conferred it should refuse leave because the plaintiff had failed to show a good arguable case to support the substance of his claim. The representations had been made by the defendant Bank by telex and telephone calls originating in the Bahamas (where it was based) to the plaintiff in London who was a sugar broker acting for a potential purchaser of a large quantity of sugar. The representations were to the effect that the sugar was in existence, that the brokers acting for the potential seller were respectable and had done deals of considerable magnitude, and that bank officials had seen the relevant documents and that they were genuine. The plaintiff alleged that, relying upon these assurances, he had made arrangements to re-sell a large part of the sugar and had turned down an offer of an alternative source of supply and that he had lost the commission which he would have earned on the re-sale of the sugar that he could have obtained from this alternative source. He alleged that the assurances given by the defendant Bank were false. In previous proceedings he had issued a writ against the Bank for negligent misrepresentation, but the trial judge had not allowed service out of the jurisdiction. In the instant proceedings the plaintiff applicant alleged that the assurances were fraudulently given by an employee of the Bank who hoped to get a private commission for himself out of the deal.

In dealing with earlier authorities Lord Denning M.R. said, 'The truth is that each tort has to be considered on its own to see where it is committed' and concluded: 'In the case of fraudulent misrepresentation it seems to me that the tort is committed at the place where the representation is received and acted upon; and not the place from which it was sent. Logically, it seems to me, the same applies to a negligent misrepresentation by telephone or telex. It is committed where it is received and acted upon.'³ The *dicta* (strictly speaking *obiter*) of Goddard and du Parc L.JJ. in *George Monro Ltd. v. American Cyanamid and Chemical Corporation*,⁴ to the effect that a tort is committed in the place in which the defendant acts, although the resultant damage occurs in England, were distinguished as being uttered in a case of negligence. Some

¹ [1944] K.B. 432, 437. See too, for example, Diplock L.J. in *Mackender v. Feldia A. G.*, [1967] 2 Q.B. 590, 599.

² [1979] 1 Q.B. 333.

³ *Ibid.*, 346.

⁴ [1944] K.B. 432.

reliance by way of analogy was placed upon *Bata v. Bata*,¹ in which the Court of Appeal held that the tort of defamation is committed where publication takes place. Specific approval was given to the British Columbia case of *Original Blouse Co. Ltd. v. Bruck Mills Ltd.*² There the tort alleged was fraud or deceit based upon false representations made by telephone and by letter from the defendant in Quebec to the plaintiff in British Columbia where they were acted upon to the plaintiff's loss. Nothing was done by the defendant in British Columbia. It was nevertheless held that the alleged tort had been committed there and that service out of the jurisdiction was accordingly permissible. Lord Denning M.R. regarded the earlier English decision of Winn J. in *Cordova Land Co. Ltd. v. Victor Brothers Inc.*³ as being 'quite distinguishable',⁴ and Stephenson L.J. specifically intimated that that case was not being over-ruled.⁵ There consignments of skins had been shipped in two vessels from Boston, Massachusetts, to Hull. The masters of the vessels had issued clean bills of lading and handed them to the shipper in Boston. On arrival, both lots of skins were found to be badly damaged. Later the bills were indorsed in favour of English buyers. The buyers sought *inter alia* to bring an action against the shipowners for the alleged fraudulent misrepresentation of their masters in issuing clean bills of lading. Winn J. held that the alleged tort had not been committed in England. The learned judge took a generally restrictive view of the sub-rule and quoted with approval the words of Scott L.J. in the *Monro* case cited above. He held that in the case before him the alleged tort had not been committed in England because 'the substance of the wrongdoing occurred in the United States of America'.⁶ The ground upon which the *Cordova* case was distinguished in *Diamond v. Bank of London and Montreal* seems to be that, whereas in *Cordova* the representation was communicated in Boston to 'whatever persons the bills of lading might come to before ever they come to the buyers in this country'⁷ although not to the plaintiff buyers themselves, in *Diamond* the representations were communicated directly and solely to the plaintiffs in England. It is to be noted that in both cases action upon the representation, which 'completed' the commission of the tort, occurred in England. The factual difference between the two cases afforded a reconciliation in terms of the principle being that what is to be looked to is 'the substance' of the alleged wrongdoing. This principle was invoked by Winn J. in *Cordova*: 'I think it is right to look at the substance of the wrong conduct alleged to be a tort.'⁸ It was adopted in *Diamond v. Bank of London and Montreal* expressly by Stephenson L.J.⁹ and impliedly by Lord Denning M.R. The third member of the court, Shaw L.J., agreed with 'both judgments'.

The judgments in *Diamond v. Bank of London and Montreal* are certainly welcome in two particular respects. First, the Master of the Rolls stated categorically that each tort has to be considered separately. Earlier suggestions of a solution of general applicability couched in mechanical terms of the place in which the defendant acted, or the place of the last event necessary for completion of the commission of a tort, or the place in which the plaintiff suffered damage, are all impliedly rejected. Secondly, it is reaffirmed that the guiding principle in considering a given tort involves looking to 'the substance of the tort'. However, this is a very general principle, and it is perhaps a matter for regret that the Court of Appeal did not take the opportunity to analyse the factors and policy considerations to be taken into account in its actual

¹ [1948] W.N. 366.

² (1963) 42 D.L.R. (2d.) 174.

³ [1966] 1 W.L.R. 793.

⁴ [1979] 1 Q.B. 333, 346.

⁵ *Ibid.*, 350.

⁶ [1966] 1 W.L.R. 793, 801.

⁷ *Per* Stephenson L.J. at p. 350.

⁸ [1966] 1 W.L.R. 793, 798.

⁹ [1979] 1 Q.B. 333, 350.

application. Moreover, a comparison of these factors and considerations with the factors and considerations to be taken into account by a judge when exercising his discretion to grant leave in cases in which his power to do so has been established could have been illuminating. Finally, it would have perhaps been salutary if the Court had emphasized the importance when investigating the location of a tort of having regard to the purpose for which such location is required. 'Where is a tort committed?' is not a question that can sensibly be asked or answered in the abstract.

Jurisdiction: the propriety of an English forum

Case No. 2. In *MacShannon v. Rockware Glass Ltd.*,¹ one of the Law Lords, Lord Diplock, reformulated Scott L.J.'s classic statement in *St. Pierre v. South American Stores Ltd.*² of the circumstances in which proceedings may be stayed notwithstanding the fact that a court is otherwise jurisdictionally competent. His Lordship restated the position thus:³ '(2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.'⁴ This formulation clearly embodied some changes, and Lord Diplock referred specifically to the elimination of the words 'oppressive' and 'vexatious' and to the omission of Scott L.J.'s concluding words placing the legal burden of proof throughout upon the defendant. His Lordship accepted that it is initially for the defendant to satisfy the court that there is another more appropriate *forum*, but took the view that the defendant's discharge of this burden then 'throws upon the plaintiffs the onus of showing'⁵ that if the action were to be stayed they would thereby be deprived of a 'legitimate personal or juridical advantage'. It would seem, however, that there was not a majority of the House for the view that the burden ever shifts from the defendant. Lord Salmon pointedly did not dissent from Scott L.J.'s reference to the burden being upon the defendant throughout.⁶ Lord Fraser agreed with Lord Salmon 'that the question for the English court is whether the defendant . . . can establish that to refuse a stay would produce injustice'.⁷ Lord Russell of Killowen was even more explicit: 'it must, I apprehend, be for the defendant to show cause why in any given case a stay ought in the exercise of judicial discretion to be ordered'.⁸ Lord Keith of Kinkel took the view that in certain cases—cases in which England is the 'natural forum'—the burden rests on the defendant throughout. Moreover, although their Lordships all appear to have accepted the general tenor of Lord Diplock's reformulation, and in particular its rejection of the notion that the plaintiff must be shown to have been wrongly motivated in the sense that he was behaving in a vexatious or deliberately oppressive way, there are certain aspects of that reformulation upon which at least some of them placed differing degrees of emphasis.⁹ Indeed, such key phrases in the new formula as

¹ [1978] A.C. 795.

² [1938] 1 K.B. 382, 398.

³ Lord Diplock did not dissent from Scott L.J.'s first and general proposition: '(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of presenting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused.'

⁴ [1978] A.C. 795, 812.

⁵ *Ibid.*, 812; see too p. 814.

⁶ *Ibid.*, 819.

⁷ *Ibid.*, 822; see too Lord Salmon at pp. 818–19.

⁸ *Ibid.*, 823.

⁹ For example, whereas Lord Salmon in expressly accepting the whole of the Scott formula

'substantially less inconvenience or expense' and 'legitimate personal or juridical advantage' are so imprecise as almost to invite differing interpretations.

In a comment in this *Year Book* on *MacShannon v. Rockware Glass Ltd.* the present writer ventured the view that the significance of the case 'will largely depend upon how uncertainties as to the incidence of the burden of proof are resolved, upon whether pre-eminence is accorded to Lord Diplock's restatement of the Scott formula, and, if so, upon how words of extraordinary flexibility and malleability such as "substantially" and "legitimate" are construed'.¹ One of the first post-*MacShannon* decisions to throw light on the matter is that of Brandon J. in the recent case of *The Wladyslaw Lokietek*.²

In *The Wladyslaw Lokietek* Polish ship-owners, who were defendants in an Admiralty action *in rem* brought against them by English cargo-owners, applied *inter alia* for a stay of all further proceedings in that action. The action was in respect of cargo being carried on a German ship which was lost as a result of a collision in the Baltic Sea between that ship and a ship owned by the defendants. In support of their application for a stay the defendants contended that the plaintiff cargo-owners' claim could be dealt with justly in Poland, to the jurisdiction of whose courts they (the defendants) were answerable. The defendants drew attention to the fact that limitation proceedings had already been instituted in Poland and that in those proceedings in order to limit their liability they had already paid money into a limitation fund there. At the same time they pointed out that it would be open to the English cargo-owners, if they brought a claim in Poland, to contest their right to limit their liability on the ground that the collision did not take place without their fault or involvement. If the Polish court were to find for the plaintiffs on this point they would be entitled to judgment for the full amount of their claim, and they would be able to enforce this in Poland. Even if the Polish court were to find against them (i.e. to hold that the defendants were entitled to limit), the plaintiffs would, on establishing their claim, receive their proportionate share of the limitation fund that had been set up. The defendants further contended that a trial in England would be less convenient and more expensive to them because they would have to bring witnesses from the Polish ship here, whereas a trial in Poland would be no more inconvenient or expensive for the English cargo-owners in that the West German witnesses from the German ship, on whose evidence they would be mainly relying, could be brought as easily to Poland as to England. The defendants also pointed out that for the action to proceed in England could give rise to duplication of proceedings in two ways: (1) the owners of the German ship and her master and crew were likely to bring claims and these were likely to be brought in Poland; (2) the defendants might have to bring a second set of limitation proceedings in England in addition to those already brought in Poland. Finally, the defendants contended that England was not the natural *forum* for the dispute. The collision had been between two foreign ships and it had occurred only just outside Polish territorial waters. Indeed, the only connection with England was that the cargo on one of the ships was owned by an English company.

The arguments adduced by the plaintiffs opposing a stay, as summarized by Brandon J., appear to have been in part simply arguments to show that an English court would be otherwise jurisdictionally competent. The arguments that, given this competence, with the sole exception of the words 'because it would be oppressive or vexatious to him' clearly did not regard the burden upon the defendant as being a light one, Lord Keith (at p. 829) treated 'substantial' as connoting only 'more than de minimis'.

¹ This *Year Book*, 49 (1978), pp. 291, 295.

² [1978] 2 Ll. L.R. 520.

the Court's discretion should not be exercised against them seem to have been two. First, they contended that the dispute did in fact have a substantial connection with England and Wales because they were an English company carrying on business here and the cargo, for the loss of which they claimed, was at the time of the collision being carried to Wales. Secondly, they claimed a juridical advantage in being able to sue in England rather than Poland. They had obtained security here for the full amount of their claim, which they needed because there was a serious issue to be tried regarding the defendant's right to limit liability, whereas in Poland they would only have security for their proportionate share of the limitation fund.

Brandon J., regarding himself as following the principles laid down in *MacShannon v. Rockware Glass Ltd.*,¹ rejected the application for a stay. In some respects at least this decision appears to reflect a distinctly cautious and restrictive approach to the innovative significance of that case. The learned judge clearly regarded the *ratio decidendi* of the House of Lords decision as being enshrined in Lord Diplock's revision of Scott L.J.'s classic formula. Brandon J. said, 'According to that decision the conditions necessary to justify a stay are (a) that the defendant must satisfy the Court that there is another forum to whose jurisdiction he is amenable in which justice can be done at substantially less inconvenience and expense and (b) that stay would not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him in England.'²

It may be noted that, neither in this almost verbatim excerpt from Lord Diplock's speech nor elsewhere in his own judgment, does Brandon J. give any clear indication as to where the burden of proof of the second condition lies.³ He nevertheless found that neither of the substantive conditions was satisfied.

So far as the former condition is concerned, he accepted that the defendants were answerable to the jurisdiction of the Polish courts, but he thought it 'open to doubt whether, if regard is paid to the position of the English cargo-owners, as well as that of the Polish ship owners, justice can be done at substantially less inconvenience and expense in Poland than in England'.⁴ The burden of proof of this condition being indisputably on the defendant, the doubt had to be resolved in favour of the plaintiff. What is of interest is that the learned Judge entertained the doubt. Having regard to the facts of the case, that he did so would appear to suggest that he treated the word 'substantial' as connoting that the burden on the defendant is a heavy one.

His Lordship had no hesitation in finding that there had been no compliance with the second condition. He held that a stay would deprive the English cargo-owners of both personal and juridical advantages and he enumerated three of them as follows. First, 'the personal advantage of suing in the Courts of their own country, which they are entitled by both English law and International Convention to do'.⁴ The relevance of the reference to this entitlement is not clear. Had they not been so entitled no question of exercising a discretion to stay proceedings could have arisen. Moreover, to treat suit in the plaintiffs' own country as *per se* an advantage to which much weight has to be attached will in many cases greatly reduce the practical importance of what was said in *MacShannon v. Rockware Glass Ltd.* Secondly, 'the juridical advantage of having security for the full amount of their claim'.⁴ This would appear to have been the plaintiffs' strongest point, and it is to be noted that deprivation of a single advantage is apparently enough, provided that the advantage is 'legitimate'. The nature of the

¹ *Supra*.

² [1978] 2 Ll. L.R. 520, 540.

³ It is difficult to attach any significance to the learned Judge's substitution of the verb 'would' for 'must'.

⁴ *Ibid.*, 540.

qualification implicit in this word is not altogether clear. If, almost by default, no meaning is attached to it, the practical significance of the *MacShannon* case will be that much further reduced. Thirdly, 'the further juridical advantage of having their claim adjudicated on by a specialist Court, with long experience of dealing with collision actions and questions of limitation of liability arising in connection with them'.¹ It is suggested with all respect that this can only properly be regarded as an 'advantage' if a Polish court lacked the qualities ascribed to the English court. In the absence of evidence on this point, the matter must turn upon the incidence of the burden of proof. If it rests on the plaintiff it would be for him to show that a Polish court lacked these qualities. Presumably, therefore, Brandon J. assumed that the burden of establishing that a Polish court had these qualities, and thus that the plaintiff would be deprived of no juridical advantage on this score, remained upon the defendant.

The true significance of *MacShannon v. Rockware Glass Ltd.* will only become apparent after a body of case-law has accumulated. *The Wladyslaw Lokietek* is but one decision of a judge sitting at first instance, but it may be a pointer. If it is, the importance of the *MacShannon* case will be more limited than many have hoped (or feared).

The non-recognition of foreign divorces: natural justice and public policy

Case No. 3. Section 8 (2) of the Recognition of Divorces and Legal Separations Act 1971 provides that 'recognition by virtue of this Act or of any rule preserved by Section 6 thereof of the validity of a divorce or legal separation obtained outside the British Isles may be refused if, and only if—(a) it was obtained by one spouse—(i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or (ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or (b) its recognition would manifestly be contrary to public policy'. In the recent case of *Joyce v. Joyce and O'Hare*² Lane J. refused to recognize a Canadian decree of divorce on the ground that a petitioner wife, who had been the respondent in the Canadian proceedings, had not been given a reasonable opportunity to take part in those earlier proceedings. She also held that to recognize the decree would be contrary to public policy under section 8 (2) (b). The main interest of the case lies in the learned Judge's consideration of the meaning of the word 'opportunity' in section 8 (2) (a) (ii) and the significance of the phrase 'the nature of the proceedings and all the circumstances' imported into that sub-section from section 8 (2) (a) (i).

The facts of *Joyce v. Joyce and O'Hare* were as follows. The parties had married in 1955, but in 1973 the husband had left the wife and the two children of the family, and in 1974 justices found that he had deserted her and had committed adultery. They granted custody of the children to the wife and ordered the husband to pay maintenance to her in respect of herself and the children. He paid nothing but went to live in Canada. In April 1975 he instituted divorce proceedings in the Province of Quebec alleging great mental cruelty. The wife wished to contest these proceedings and consulted solicitors, who made repeated approaches to various bodies in Canada with a view to obtaining legal representation for her, but she was not eligible for legal aid

¹ [1978] 2 Ll. L.R. 540.

² [1979] Fam. 93.

unless physically present in the Province of Quebec. The Registrar of the Quebec court was informed that the wife wished to contest the husband's petition and that English maintenance orders made on the ground of the husband's desertion and adultery were in arrear: however, Quebec rules of procedure prevented any letters written by the wife's solicitors from being placed before the court. In an undefended suit, the Quebec judge, without knowledge that the wife wished to be heard or that there had been earlier maintenance proceedings, granted the husband a decree, awarded the custody of the children to the wife and ordered the husband to pay \$70 a week for the children's maintenance. That order for maintenance could, however, only be enforced by the wife if she was present in Canada.

Subsequently the wife petitioned for divorce in England and the husband by his answer sought recognition of the Quebec decree. In these English proceedings Lane J. had no difficulty in holding that the Quebec court was jurisdictionally competent as the husband was habitually resident in that Province. Nor was there any doubt that the wife had had adequate notice of the Quebec proceedings. The dispute was as to whether she had been given 'such opportunity to take part in the proceedings as, having regard to the matters aforesaid [i.e. the nature of the proceedings and all the circumstances], [s]he should reasonably have been given'.¹ In deciding that the wife had not been accorded such an opportunity the learned Judge in effect laid down that such an opportunity exists only when it exists both as a matter of law (of the country of rendition) and as a matter of fact. She accepted the submission that 'a spouse against whom a foreign decree is to be recognised by an English court must have had, first, the right to be heard. Secondly, the ability or facility to place herself in a position to put her views before the court. If on either of those grounds the party is shut out, then to a greater or lesser extent the opportunity referred to in the sub-section is defective.'² It is respectfully submitted by the present writer that, having regard to the facts of the instant case, the application of this principle would have been a simple, sure and sufficient ground upon which to withhold recognition of the Quebec divorce. Unfortunately, however, the learned Judge was not content with this and she proceeded to range widely in her consideration of the significance to be attached to the requirement that regard be had to 'the nature of the proceedings and all the circumstances'. She took the view that amongst the factors to be taken into account in this context were the fact that there had been earlier proceedings, the nature of the remedies which would have been available to the wife if she had taken part in the Quebec proceedings, the methods of enforcement of the Quebec judgment, and the consequences to the respondent and his second wife if recognition were refused. Lane J. seems, with respect, to have completely overlooked the fact that the purpose, and the only purpose, for which regard is to be had to 'the nature of the proceedings and all the circumstances' is that of determining whether there had been an adequate opportunity to take part in the foreign proceedings. It is very difficult to see how factors such as these could have any bearing upon that specific issue. Section 8 (1) (a) is concerned with cases in which there has been what is traditionally described as a denial of natural justice. Lane J., however, seems to have treated it as conferring upon her a far-reaching discretion to withhold recognition from the decree of a jurisdictionally competent court if to grant it would produce an unjust result. Indeed, she spoke of 'doing justice to all the parties, including children of the marriage and any new wife whom the holder of the foreign decree may have taken, and any offspring of such a second

¹ Section 8 (2) (a) (ii).

² [1979] Fam. 93, 111.

marriage',¹ and concluded '... in all the circumstances of this case, if I were to recognise the Canadian decree it would indeed jar upon my conscience'.²

The learned Judge then went on to hold (in a five-line paragraph)³ that to recognize the decree would in addition be contrary to public policy under section 8 (2) (b) of the Act. This is reminiscent of the twist given to the concept of public policy in the conflict of laws by Hollings J. in *Kendall v. Kendall*.⁴ As traditionally understood, whereas the defence of denial of natural justice impugns the foreign court's procedures, resort to public policy usually alleges the intrinsic unacceptability of the content of a rule of foreign substantive law. An English *forum* will neither itself apply, nor will it recognize the application of, a rule which is inherently repugnant to its public policy. In *Kendall v. Kendall*, a case in which the wife was in fact the victim of a flagrant denial of justice, Hollings J. took the view that the defence of public policy was available even though the divorce had been granted on the ground of physical cruelty—a ground obviously in no way repugnant to English public policy. In *Joyce v. Joyce and O'Hare* the Quebec divorce was seemingly pronounced on the ground of mental cruelty. English courts have often recognized foreign decrees granted on this ground without the spectre of public policy being raised. What is remarkable, however, is that Lane J. does not refer to the content of the substantive Quebec law, but merely indicates that the factors, which she thought it proper to take into account when considering whether the wife had had an adequate opportunity to participate in the Quebec proceedings, also justified her in invoking the doctrine of public policy.

The Recognition of Divorces and Legal Separations Act 1971 is generally mandatory in its terms: its policy is to prescribe recognition. Section 8 does introduce a discretion: this is implicit in the use of the word 'may'. But this discretion is a discretion to accord recognition notwithstanding that the case falls within the section; it is not a discretion to withhold recognition even though it does not do so. Still less is it a discretion which is available when considering whether or not the case in fact does fall within the section. The section, it is to be noted, is emphatic that non-recognition is permissible if 'and only if' those requirements have been met. This directly precludes resort to any discretion to exclude on any further ground that recognition would produce injustice. Moreover, in these circumstances it is a matter for serious reflection whether either consideration of irrelevant and possibly prejudicial matters when determining whether or not there has been a denial of adequate opportunity to participate in the foreign proceedings, or a marked extension of traditional public policy doctrine, is warranted. To assert this is, of course, not to quarrel with the actual decision in *Joyce v. Joyce and O'Hare*: the wife had clearly not been given such opportunity to take part in the Quebec proceedings as she ought reasonably to have been given.

The recognition of foreign nullity decrees and capacity to re-marry

Case No. 4. The facts of the recent case of *Perrini v. Perrini*⁴ were as follows. An Italian domiciled in Italy married an American woman in Italy in 1957. The woman returned to the United States after the ceremony, and the marriage was never consummated. In 1961 she obtained a decree of nullity from a New Jersey court. Although the court assumed jurisdiction on the basis of only six months' residence, the woman had in fact resided in New Jersey for more than three years before instituting the

¹ [1979] Fam. 112.

³ [1977] Fam. 208. See this *Year Book*, 49 (1978), pp. 295 et seq.

² *Ibid.*, 114.

⁴ [1979] Fam. 84.

proceedings. The decree would not be recognized in Italy. In 1967 the man (who was the present respondent) married the present petitioner, an English woman, in London. They went to live in Italy but later came to England intending to settle here. In 1971 they separated, and in the following year the petitioner brought a petition for (as amended) nullity on the ground that the respondent's Italian marriage was valid and subsisting and that her marriage to him was therefore void *ab initio*.

Sir George Baker P. opened his judgment with the words: 'The issue is whether the marriage between the petitioner and the respondent (who, for convenience, I will call the wife and the husband) at the Westminster Register Office on April 8, 1967 ("the London wedding") is valid.'¹ An orthodox approach to this question of essential validity of marriage (or capacity to marry) would involve looking first to the immediately pre-marriage domiciliary law of each party. The 'dual domicile' test requires that each party have capacity by the law of his or her domicile. As here the man was domiciled in Italy and the Italian courts (not recognizing the New Jersey decree) would regard him as a married man and thus lacking in capacity, the subsequent London marriage would by the application of this test *simpliciter* be regarded as void. However, orthodox doctrine also prescribes that, by way of exception to the 'dual domicile' rule, 'the validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England'.² Resort to this exception would, on the facts of *Perrini v. Perrini*, have led to the conclusion that the validity of the English marriage should turn exclusively upon whether the parties had capacity by English law. This in its turn would depend upon whether the New Jersey decree would be recognized in England.³ Whether the New Jersey decree would be so recognized is, on earlier authority, not altogether clear. Resort could perhaps be had to the doctrine of *Indyka v. Indyka*,⁴ there seemingly being a real and substantial connection between the first wife and New Jersey. *Indyka v. Indyka* itself was, of course, a case of divorce, but in *Law v. Gustin*⁵ the doctrine was applied by a judge sitting at first instance so as to allow the recognition of a nullity decree. A possible alternative would involve introducing the doctrine of *Travers v. Holley*⁶ (as elaborated in *Robinson-Scott v. Robinson-Scott*)⁷ into the law of nullity. The New Jersey court had taken jurisdiction in circumstances in which *mutatis mutandis* an English court would have had jurisdiction. The *Travers v. Holley* principle would therefore lead to recognition; there is no authority for the application of that doctrine in nullity cases.

The learned President, however, saw the issue of the validity of the parties' marriage in a different and somewhat unorthodox perspective. He seems to have regarded the question of the husband's capacity by the law of his domicile as being of subsidiary importance. He treated the recognition of the New Jersey decree in England as being the central issue. What is remarkable is that he did not give any indication that in doing this he was relying upon the well-recognized exception to the 'dual domicile' test set

¹ *Ibid.*, 87-8.

² Dicey and Morris, *The Conflict of Laws* (9th edn., 1973), p. 518. See *Sottomayor v. De Barros* (No. 2), (1879) 5 P.D. 94; *Chetti v. Chetti*, [1909] P. 67.

³ It might be contended that such an enquiry would not be necessary as the wife had capacity by the law of her domicile and the law of the husband's domicile is rendered immaterial. The weakness of such a contention would seem to be that English law does not permit a person to enter into a bigamous marriage even though it is the other party who would be committing bigamy.

⁴ [1969] 1 A.C. 33.

⁵ [1976] Fam. 155.

⁶ [1953] P. 246.

⁷ [1958] P. 71.

out above. He criticized the application of that test by Sir Jocelyn Simon P. in *Padolecchia v. Padolecchia*,¹ which case he did not follow. Instead he referred to 'matrimonial residence as an alternative test'² and cited *Radwan v. Radwan* (No. 2).³ This is heady stuff, and with all respect, two countervailing points must be made. First, the well-known alternative test does not prescribe reference to the law of the matrimonial residence as such, but to the law of the intended matrimonial home at the time of the marriage. In *Perrini v. Perrini* it would appear that the parties at the time of the marriage intended to live in Italy and that for a short time they in fact did so. Secondly, the issue before Cumming-Bruce J. in *Radwan v. Radwan* (No. 2) was a very narrow one—it was as to what law should govern an incapacity to enter into a marriage simply because it was polygamous. Cumming-Bruce J. expressly said 'Nothing in this judgment bears upon . . . the effect of bigamy upon capacity to enter into a monogamous marriage'.⁴

In recognizing the New Jersey decree the learned President appears to have relied in part upon the *Indyka* doctrine (and he approved Bagnall J.'s decision in *Law v. Gustin*), but also in part upon the *Travers v. Holley* principle. It is submitted that, if either of these doctrines (both now statutorily abolished⁵ in divorce, their sphere of origin) is to find a place in the law of nullity, it should be the former rather than the latter. The doctrine of *Indyka v. Indyka* gives to a court a measure of flexibility in cases in which the decree was made in an appropriate and natural *forum*, whereas *Travers v. Holley* was based upon considerations of purely jurisdictional reciprocity. Indeed it is perhaps to be hoped that, when assessed as an authority, *Perrini v. Perrini* will stand for no more than the availability of the *Indyka* doctrine in nullity cases. Pending the long-overdue statutory overhaul of the law relating to the recognition of foreign nullity decrees, this could be a very useful palliative.

The enforcement of foreign judgments: miscellaneous points

Case No. 5. In the recent case of *S.A. Consortium General Textiles v. Sun and Sand Agencies, Ltd.*⁶ the Court of Appeal addressed itself to a variety of questions relating to the enforcement of foreign judgments. The case was itself concerned with an application to register the judgment of a French court under section 2 (1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, but more than one of the matters that fell to be considered is also germane to the law relating to common law actions for the indirect enforcement of foreign judgments.

In 1974 the plaintiffs, a French textile company with its head offices and a branch at Lille and another branch in Paris, sold clothing from both those branches to the defendant English merchants. The invoices for the goods from Lille provided that any disputes were to be referred to the Lille commercial court, and those for the Paris goods gave exclusive jurisdiction to the Seine commercial court. After delivery of the goods the plaintiffs claimed from the defendants in London a total of 729,444 francs, part of which was in respect of the Lille goods and part in respect of the Paris goods. By telephone on 15 July 1975, and by letter the following day, the defendants' solicitor told the plaintiffs' London solicitor that it had been clearly stated that all disputes were to be brought before the Lille court and that any action in England would be stayed.

¹ [1968] P. 314.

² [1979] Fam. 84, 89.

³ [1973] Fam. 35.

⁴ *Ibid.*, 54.

⁵ Recognition of Divorces and Legal Separations Act 1971. The abolition of the doctrines is not quite complete in that they may still be relevant when considering the efficacy of a divorce granted before 1 January 1972 in another part of the British Isles.

⁶ [1978] Q.B. 279.

The next day the plaintiffs commenced proceedings against the defendants in the Lille court for 729,444 francs, £6,989 for the price of goods sold and delivered, and a further 10,000 francs as '*résistance abusive*'—a head of damages awardable in France where a defendant has unreasonably refused to pay a plain claim. The French writ was served on the defendants, who ignored it, and in October 1975 the Lille court, in default of the defendants' appearance, gave judgment for the plaintiffs for the amounts claimed, interest and costs. On 29 January 1976 the defendants were given written notice of the judgment and of their right of appeal within three months, but they ignored the notice itself and a reminder of 2 March 1976. In August of that year the plaintiffs made their application to the English High Court to have the Lille judgment registered under the 1933 Act. This application was successful before the Master in so far as it related to the Lille goods (and the £6,989) but not in so far as it related to the Paris goods or the 10,000 francs for *résistance abusive*. The defendants then became active. In October they issued a writ in the Paris commercial court claiming some £80,000 against the plaintiffs in respect of goods supplied by the Paris branch, and in December they sought leave to appeal out of time against the Lille judgment. After this latter application was refused they appealed to the full court at Douai. In February 1977 Parker J. allowed the plaintiffs' appeal from the Master and ordered that the whole of the Lille judgment be registered under the 1933 Act. The defendants then appealed to the Court of Appeal. The Court of Appeal (Goff. L.J. dissenting in part) dismissed the appeal. The defendants' contentions which were rejected by the court can be considered under four headings.

First, the defendants sought to rely on the fact that, although the French Code of Civil Procedure provided that a judgment by default against a party residing abroad should expressly state the steps taken to bring the summons to the defendants' knowledge, the Lille court's judgment had simply recited that the defendants had been regularly summoned to appear at the hearing. This, the court held, could not avail the defendants because the defect¹ in the judgment did not make it a nullity in France. As Lord Denning M.R. said, 'It only made it voidable. It would not render it a nullity unless on appeal a competent court declared it to be so.'² There was some doubt as to whether, if application were made, a French court would declare the judgment a nullity, but the important point was that no French court had in fact done so. Goff L.J. said, 'So the evidence that it is unassailable is perhaps open to question, as there is a conflict about that between the French legal advisers, but it is clearly common ground that the judgment can only be attacked, if at all, on appeal. It is, therefore, good until set aside.'³ And Shaw L.J. added, 'It seems clear enough that the judgment it is sought to register is under French law voidable and not void: accordingly it cannot be disregarded unless and until it is declared a nullity by the appellate court at Douai.'⁴

The context of this aspect of the decision was the defendants' contention that registration was precluded by section 2 (1) (b) of the 1933 Act, which provides that 'a judgment shall not be registered if . . . (b) it could not be enforced by execution in the country of the original court'. This contention was rejected because by French law the judgment was merely voidable and, as it had not in fact been avoided, it seemingly could be executed in France. It is to be hoped, however, that the principle underlying this approach may have wider implications in the law relating to the enforcement of foreign judgments. There is, for example, some doubt as to whether it is a defence to

¹ The defect was not failure to take the required steps, but failure to recite the steps taken.

² Ibid., 297.

³ Ibid., 302.

⁴ Ibid., 307.

a common law action on a foreign judgment that the foreign court lacked competence according to its own rules or that it misapplied its own rules of procedure. These are matters upon which the cases do not speak with one accord.¹ It is submitted that this uncertainty would be rationally resolved by the adoption of an approach analogous to that adopted by the Court of Appeal in applying section 2 (1) (b). Surely an English court should accord to the foreign judgment which is defective on account of lack of internal competence or misapplication of procedural rules as much effect as, but no more than, would be accorded to it in the country of rendition.

Secondly, the defendants sought to rely on section 5 (1) of the 1933 Act. This sub-section provides: 'If, on an application to set aside the registration of a judgment, the applicant satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment, the court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.' Although the defendants had appealed to the Douai court after the refusal of their application to be allowed to appeal out of time against the Lille judgment, and although they had issued a writ in the Paris commercial court alleging that the Paris goods were defective, the Court of Appeal was unanimous in refusing to exercise in their favour the discretion conferred by the sub-section. Goff L.J. enumerated six reasons: (1) the trial judge had exercised his discretion in the plaintiffs' favour; (2) the Lille court had undoubted jurisdiction so far as the claim related to the Lille goods, and yet the defendants had ignored the whole proceedings; (3) after the Lille judgment had been given there had been a further long delay before anything like a detailed statement of defence or counterclaim was produced; (4) registration would not affect the defendants' rights in France; (5) before the defendants could appeal on the merits in France they would have to succeed on two purely technical points; (6) the hearing of the appeal was not even imminent.² In common law cases the circumstance that an appeal is pending does not prevent a foreign judgment from being treated as 'final and conclusive' for the purpose of its recognition and enforcement here; but execution may be stayed pending the outcome of the appeal. The position is not, therefore, significantly different from the position under the 1933 Act. The possibility of a foreign judgment being enforced in England, although liable to be extinguished in the country of rendition, is at first sight surprising. But justification for this rule is to be found in practical considerations. A defaulting foreign judgment debtor might otherwise by the dilatory pursuit of unmeritorious appeals and re-hearings cause great delay and injustice to the unsatisfied judgment creditor. The English court must have the power to prevent this. Moreover, it is a power which it should not be loth to exercise. As Goff L.J. indicated, there was a multiplicity of reasons for allowing its exercise so as to protect the judgment creditor in *S.A. Consortium General Textiles v. Sun and Sand Agencies, Ltd.*

A third point unsuccessfully made by the defendants concerned the award of 10,000 francs for *résistance abusive*. They argued that the judgment for this sum should be excluded because it was a sum payable in respect of 'a fine or other penalty' within section 1 (2) (b) of the Act, and further that the enforcement of it 'would be contrary

¹ See, e.g. *Vanquelin v. Bouard*, (1863) 15 C.B. (N.S.) 341; *Castrique v. Imrie*, (1870) L.R. 4 H.L. 414, 429; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Bater v. Bater*, [1906] P. 209; and *Papadopoulos v. Papadopoulos*, [1930] P. 50.

² [1978] Q.B. 279, 306-7.

to public policy' in England under section 4 (1) (a) (v). *Résistance abusive* is a head of damages awardable in France where a defendant has unreasonably refused to pay a plain claim. The defendants' argument was dealt with quite shortly. Lord Denning M.R. said, 'The word "penalty" in the statute means, I think, a sum payable to the state by way of punishment and not a sum payable to a private individual, even though it is payable by way of exemplary damages. Likewise I see nothing contrary to English public policy in enforcing a claim for exemplary damages, . . . In any case, . . . it is not a claim for exemplary damages, but it is a claim for compensatory damages, so as to compensate the plaintiff for losses not covered by an award of interest, such as loss of business caused by want of "cash flow", or for costs of the proceedings not covered by the court's order for costs.'¹ Goff L.J. said that 'this was a further award of damages or compensation. It is not a fine or other penalty within the section and no question of public policy arises.'² Shaw L.J., regarding the claim as 'compensatory purely', said, 'It represents damage other than loss of interest which flows from a failure of a party to a mercantile transaction to pay in accordance with his obligations. Deprivation of the use of capital may be disruptive of a business and may involve loss beyond mere interest on capital.'³

The court seems to have regarded characterization of an award for the purposes of section 1 (2) (b) as being 'a fine or other penalty' as depending on the same criteria as obtain at common law: the crucial question is, was the award intended to penalize or to compensate? As the award of the 10,000 francs was in a broad sense intended to compensate, it did not fall within section 1 (2) (b). Equally clearly in these circumstances its enforcement would not be contrary to English public policy. What their Lordships said about 'exemplary damages' was, strictly speaking, by way of *obiter dictum*, but it is interesting. Had the award been of exemplary damages, its enforcement would again have involved no contravention of public policy. But is it clear that it would not have been penal? Is not punishment a major objective of such an award?⁴ Lord Denning M.R. would apparently regard such an award as nevertheless non-penal, but neither of the other members of the court committed himself to this view. Indeed Goff L.J. seems, when referring to what the position would have been had the award been for exemplary damages, to be rather deliberately confining his observations to the absence of public policy implications.⁵

A fourth argument put forward on behalf of the defendants was that the Lille court lacked jurisdiction to deal with the Paris debt because, in respect of that debt, they had neither 'submitted to the jurisdiction of that court' within the meaning of section 4 (2) (a) (i), nor 'agreed . . . to submit to the jurisdiction of that court' within the meaning of section 4 (2) (a) (iii) of the 1933 Act. However, a majority of the Court of Appeal (Lord Denning M.R. and Shaw L.J.) held that the Lille court did have jurisdiction to deal with the Paris debts as well as the Lille debts, and that this was the case by virtue of either sub-section. Goff L.J. dissented, but the disagreement between his Lordship and the majority seems to be largely based upon differing interpretation of the significance of French pleadings in regard to the applicability of section 4 (2) (a) (i), and differing interpretation of facts in regard to the applicability of section 4 (2) (a) (iii).

What is of more general interest is the disagreement between Shaw L.J., a member of the majority, and the dissentient Goff L.J. on the one hand, and Lord Denning M.R.

¹ Ibid., 299-300.

² Ibid., 306.

³ Ibid., 309.

⁴ 'Exemplary damages are awarded not only by way of compensation but as a punishment to the offender': *Osborn's Concise Law Dictionary* (6th edn.), p. 109.

⁵ [1978] Q.B. 279, 305.

on the other hand, as to the significance to be attached to an agreement to submit to the jurisdiction of a particular foreign court. Is such an agreement to be deemed to be an agreement to submit to the jurisdiction of any court in the country in which the named court is located? Goff and Shaw L.JJ. took the view that there is an agreement to submit under section 4 (2) (a) (iii) to 'the courts of the country of that court' 'only where there is an express submission in general terms to the courts of the country rather than to individual courts'.¹ Submission to the Paris court did not, therefore, imply submission to all French courts. Lord Denning M.R. took the contrary view: 'It may fairly be assumed that each of the courts of a country applies the same law, that is, the law of the country itself. So a submission to the jurisdiction of any one of the courts of that country should be treated as equivalent to a submission to the jurisdiction of any of the other courts of the country. In this case, therefore, when the English company agreed to submit the dispute with the Paris branch to the commercial court of Paris it must be taken to be equivalent to a submission to any of the courts of France, including the Lille court.'² With all respect, surely the majority view is essentially correct. The guiding factor should be the intention of the parties, and, in the absence of evidence to the contrary, it seems reasonable to suppose that, if parties in a choice-of-jurisdiction clause choose a court sitting in Paris, they do not regard themselves as submitting to the jurisdiction of a court sitting in, say, Marseilles.³ Of course, in a particular (but one would have thought not very common) case, there might be clear indications that the parties did indeed intend to submit more widely than to the named court. For this reason the use of the word 'express' by the majority is perhaps unduly restrictive.

P. B. CARTER

¹ [1978] Q.B. 279 *per* Shaw L.J. at p. 309.

² *Ibid.*, 298-9.

³ Greater confusion might arise in the case of nomination of a court in a federal State, especially if some, but not all, of its component units applied similar law. Would agreement to submit to the jurisdiction of a Toronto court be deemed to include submission to the jurisdiction of a Vancouver court sitting thousands of miles away on the ground that the relevant law was the same, but not to include submission to the jurisdiction of a Montreal court on the ground that the relevant law there was very likely to be different?

DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1979*

Freedom of speech (Article 10)—restriction to maintain the authority of the judiciary (Article 10 (2))

*Case No. 1. The Sunday Times case.*¹ The Court held that an injunction granted by the English courts preventing as contempt of court the publication of a newspaper article on the thalidomide tragedy was a breach of the freedom of speech guarantee in Article 10. There was no breach of Article 10 as read with Article 14.

Following the thalidomide tragedy, a lot of parents issued writs for negligence against Distillers, the British manufacturers. In 1972, while negotiations to settle the claims were pending, *The Sunday Times* planned the publication of an article which reviewed the evidence on the question whether Distillers had been negligent. The Attorney-General obtained an injunction from the Divisional Court preventing the publication of the article on the ground of contempt of court. The injunction was discharged by a unanimous Court of Appeal, but restored at the instruction of a unanimous House of Lords. The reasons given by their Lordships varied. Lords Reid, Morris, and Cross emphasized the 'prejudgment' principle (by which 'trial by newspaper' of issues that are the subject of court proceedings is not to be tolerated); Lords Diplock and Simon relied mainly on the 'pressure' principle (by which it is contempt to bring pressure upon a person not to abandon or settle his case). All their Lordships were agreed that the proposed article was in contempt because it posed a real threat to the proper administration of justice. The injunction was eventually discharged in 1976 after almost all of the claims against the company had been settled. The Attorney-General stated that the four cases that were still outstanding could have been brought to court by then if they had been pursued diligently. Proceedings against Distillers by its insurance company denying liability for the settlement reached by Distillers with the parents because of Distillers' negligence were still being actively pursued when the injunction was discharged.

The application was brought by the publisher, editor and a group of journalists of *The Sunday Times*. The Commission expressed the opinion, by 8 votes to 5, that the injunction was a breach of Article 10. The case was referred to the Court by the Commission.

The Court agreed that Article 10 had been infringed because the restriction, although 'prescribed by law' and imposed for a legitimate purpose, was not 'necessary in a democratic society' for the maintenance of the 'authority . . . of the judiciary'. The full Court reached this conclusion by 11 votes to 9.

On the meaning of the expression 'prescribed by law' in Article 10 (2), the Court stated that this wording imposed two requirements:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.

* © D. J. Harris, 1980.

¹ A. 6538/74. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 18 (1975), p. 202. Report of the Commission adopted on 18 May 1977. European Court of Human Rights (cited in these notes as E.C.H.R.), Judgment of 26 April, 1979. English text authentic. The case was heard by the plenary Court.

Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

The Court concluded that although the English law of contempt was not as clear as it might be, the applicants 'were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article' might be contempt. There was 'no doubt' that this was so insofar as the House of Lords relied on the 'pressure' principle, which was clearly to be found in earlier case-law. Although the 'prejudgment' principle was not so well-established, it was not new; there were sufficient indications in the various authorities that it could provide the basis for a finding of contempt.

The Court also considered that the injunction could be justified as having an aim permitted by Article 10 (2), viz. the maintenance of 'the authority . . . of the judiciary'.

More difficult was the question whether the restriction that the injunction imposed was 'necessary in a democratic society' to achieve that aim. In the Court's opinion, it was not. This was so even allowing for the 'margin of appreciation' doctrine by which, as the Court had recognized in the *Handyside* case,¹ the Convention allowed a State a certain amount of discretion in the imposition of restrictions permitted by Article 10 (2). Commenting generally on the doctrine, the Court said that it did 'not mean that the Court's supervision is limited to ascertaining whether a respondent state exercised its discretion reasonably, carefully and in good faith'. In the Court's opinion 'a contracting state so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention'. The Court also stated that 'the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2)'. Thus, whereas in the case of the 'protection of morals', attitudes vary a lot from one State to another, so that a greater degree of discretion could properly be left to the local State, 'the same cannot be said of the far more objective notion of the "authority" of the judiciary'. In this context, 'a more extensive European supervision corresponds to a less discretionary power of appreciation'.

On the meaning of 'necessary' in Article 10 (2), the Court confirmed what it had said in the *Handyside* case, viz. that it was not synonymous with indispensable, but implied the 'existence of a pressing social need'. Applying this approach, the Court examined the facts of the case and concluded that 'the interference [with the maintenance of the authority of the judiciary] complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression'. It was therefore not 'necessary', i.e. not 'proportionate to the legitimate aim pursued'. The Court considered that the 'prejudgment' principle was more relevant on the facts than the 'pressure' principle (the article would not, in the Court's view, have added much to the pressure upon Distillers to settle on better terms). But it referred to a number of factors which either limited the 'prejudging' effect of the article or indicated the strength of the countervailing freedom of speech argument. The article was in

¹ E.C.H.R., Judgment of 7 December 1976.

moderate language and did not present just one side of the story, so that a reader could make up his own mind; there had been other public discussion of the case, and the article could serve 'as a brake on speculative and unenlightened discussion'; the 'thalidomide disaster was a matter of undisputed public concern' raising fundamental moral and legal issues; there had been no public enquiry to reveal the facts of a case that 'had been in a "legal cocoon" for several years'; and 'the families of the numerous victims of the tragedy . . . had a vital interest in knowing all the underlying facts and the various possible solutions'. Moreover, as the Court stressed, it was not free, as was the House of Lords when applying English law, to choose between two principles (freedom of speech and the proper administration of justice) of equal weight. The structure of Article 10 was such that the Court had to give priority to freedom of speech and to interpret the latter narrowly as one of the permitted exceptions to it.

The nine dissenting judges, who included Judge Sir Gerald Fitzmaurice, presented a united front. In their joint dissenting judgment, they disagreed with the majority essentially on the question whether the injunction was 'necessary' and on the latitude to be given to the defendant State under the 'margin of appreciation' doctrine. They pointed out that the 'authority and impartiality of the judiciary' exception allowed by Article 10 (2) was inserted on the proposal of the United Kingdom when the Convention was drafted to take account of the common law of contempt which is 'peculiar to the legal traditions of the common-law countries . . . and . . . is unknown in the law of most of the member states'. In the opinion of the dissenting judges, the conclusion of the majority that the 'authority . . . of the judiciary' was a far more objective notion than that of 'the protection of morals' (so that less discretion should be allowed to the defendant State) was erroneous. It was 'by no means divorced from national circumstances and cannot be determined in a uniform way'. Evidence for this was to be found in the different ways in which States went about protecting that authority. A State such as the United Kingdom that relied upon the law of contempt to protect it should be given sufficient latitude to apply it as national circumstances warranted or required.

The Sunday Times case is the first in which the Court has been called upon to consider whether a judgment applying a rule of common law complies with the Convention. Crucial to the Court's decision was its understanding of the difference between the approach that it could adopt under Article 10 and that open to the House of Lords at common law. Whereas it had to give priority to freedom of expression, the House of Lords could give equal weight between two competing freedoms. Even so, it is difficult to avoid the conclusion that had the House of Lords been applying Article 10 (and it is interesting to note that the Convention is not referred to by any of their Lordships) it would have found the injunction to have been 'necessary' in the sense in which the Court interpreted that term. It would seem, moreover, that when applying the 'margin of appreciation' doctrine in this context, the Court reduced it almost to vanishing point. It appears to have made its own assessment of the situation *de novo* and simply to have disagreed with that of the House of Lords. It seems likely that the Court found confidence to do this in the lack of unanimity among English judges on the proper scope of the law of criminal contempt and its application in this case. Certainly it was affected by the fact, to which it refers, that the Phillimore Committee had suggested that the 'prejudgment' principle should be reconsidered¹ and that the British Government White Paper² had not called in question this suggestion.

¹ *Report of the Committee on Contempt of Court*, Cmnd. 5794, para. 111.

² *Contempt of Court: A Discussion Paper*, Cmnd. 7145, para. 43.

The Government is now preparing a bill on the law of contempt which will, *inter alia*, take into account *The Sunday Times* case.¹

Another part of the Court's judgment that is of great interest is the passage quoted above on the meaning of 'prescribed by law', which might well be mistaken for a passage from Dicey's discussion of the Rule of Law. It raises questions about the process of judicial lawmaking as well as the publication of legal rules. Would a decision changing the common law and applying retroactively, in the usual way, state a rule which was 'prescribed by law'? And would unpublished sub-delegated legislation of the sort criticized by Scott L.J. in *Blackpool Corporation v. Locker*² pass the Court's test?

A final, brief comment concerns the size of the plenary Court now that there are twenty-one members of the Council of Europe. To an outsider, a court of more than twenty judges seems unduly large, particularly when different legal traditions and languages are represented.

Right to family life (Article 8)—right to the peaceful possession of one's property (Article 1, First Protocol)—discrimination in the protection of each of the above (Article 14)—their application to the status of illegitimate children and their parents

Case No. 2. Marckx case.³ The Court held that certain rules of Belgian law discriminating against illegitimate children were, as they applied to the applicants, in violation of the right to family life protected by Article 8, both by itself and when read with Article 14. It also held that the right to property in Article 1 of the First Protocol had been infringed when read with Article 14 in respect of one of the applicants. It rejected other claims based upon Articles 3, 8, 12, and 14 of the Convention and Article 1 of the First Protocol.

The first applicant, an unmarried Belgian national, claimed on behalf of her infant daughter and herself. She complained of the law in Belgium on (i) the maternal affiliation of an illegitimate child; (ii) his family relationships; and (iii) his patrimonial rights. Under Belgian law, an illegitimate child is only regarded as the child of his mother if the latter in her discretion formally recognizes her maternity. If she does so, the affiliation is retroactive to the date of birth. In the case of a legitimate child, there is no such need or delay: affiliation is proved simply by the legally obligatory entry of the married mother's name on the birth certificate. As regards family relationships, an illegitimate child remains, even after recognition, in principle a stranger to his parents' families. Thus, for example, in the absence of his mother, it is his guardian rather than his grandparents who has the power to consent to his marriage. The reverse is true of legitimate children. Similarly, the patrimonial rights of an illegitimate child are in certain ways less than those of a legitimate child, both in respect of inheritance and of *inter vivos* gifts.

The Commission expressed the opinion in its report that Article 8 had been infringed both taken by itself and in conjunction with Article 14. It was also of the opinion that Article 1, First Protocol, had been infringed when read with Article 14 in respect of the mother. It referred the case to the Court.

¹ See *Hansard*, H.C. Debs., vol. 973, col. 903 (12 November 1979) for a statement by the Attorney-General to the effect that a bill will be presented to Parliament in 1980.

² [1948] 1 K.B. 349.

³ A. 6833/74. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 18 (1975), p. 248. Report of the Commission adopted on 10 December 1977. E.C.H.R., Judgment of 13 June 1979. French text authentic. The case was heard by the plenary Court.

Before considering the details of the complaints under Article 8, the Court made two general points. First, it confirmed that Article 8 makes no distinction between the 'legitimate' and the 'illegitimate' family. It considered that this followed from the use of the word 'everyone' in Article 8 and the prohibition in Article 14 of discrimination based upon 'birth'. The Court also referred to Committee of Ministers Resolution (70) 15 on the special protection of unmarried mothers and their children, which was based on the same view. Secondly, the Court indicated that Article 8 had a positive as well as a negative side. Not only did it require States to refrain from interfering with family life, but, 'in addition to this primary negative undertaking, there may be positive obligations inherent in an effective "respect" for family life'. In the context of 'illegitimate' families, this second aspect of Article 8 meant, *inter alia*,

. . . that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2.

The Court examined the complaints under Article 8 from the standpoint of each of the applicants in turn. As far as the *affiliation* rules in Belgian law were concerned, the Court held that they infringed Article 8 taken by itself with respect to both the mother (by 10 votes to 5) and the daughter (by 12 votes to 3). The consequences of recognition and non-recognition were such that the mother was placed in a dilemma which was not consistent with 'respect for' family life. As far as the daughter was concerned, although she had in this case been recognized by her mother within a fortnight of birth, there had been a violation of Article 8 for the short period during which the child was separated in law from her mother. Similarly, the Court held that Article 8 had been infringed when read with Article 14 with respect both to the mother (by 11 votes to 4) and the daughter (by 13 votes to 2). In doing so, the Court stated that while 'support and encouragement of the traditional family is in itself legitimate or even praiseworthy', it could not be given at the expense of the 'illegitimate' family, which was equally protected by Article 8. Although it had been acceptable to distinguish between 'legitimate' and 'illegitimate' families at the time the Convention was drafted, the Convention 'must be interpreted in the light of present-day conditions' and the Court could not 'but be struck by the fact that the domestic law of the great majority of the member states of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full jurisdictional recognition of the maxim "*mater semper certa est*"'. The Court referred, in particular, to the European Convention on the Legal Status of Children born out of Wedlock 1975.¹

On the question of *family relationships*, the Court first indicated that it understood 'family life' in Article 8 as including 'at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life'. The Court continued:

Respect for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally . . . Yet the development of the

¹ *European Treaty Series*, No. 85; *Parliamentary Papers*, Miscellaneous No. 2 (1976) Cmnd. 6358).

family life of an unmarried mother and her child whom she has recognised may be hindered if the child does not become a member of the mother's family and if the establishment of affiliation has effects only as between the two of them.

Accordingly, the Court held, by 12 votes to 3, that there had been a breach of Article 8 with respect to both applicants because the daughter was not in Belgian law regarded as a member of her mother's family. The Court held, by 13 votes to 2, that the same facts amounted to a breach of Article 8 as read with Article 14. Although 'the tranquillity of "legitimate" families may sometimes be disturbed if an "illegitimate" child is included, in the eyes of the law, in his mother's family, on the same footing as a child born in wedlock', this was not sufficient to justify depriving such a child of 'fundamental rights'.

Applying Article 8 to the *patrimonial rights* of the applicants, the Court held that there had been no breach of the Article taken by itself in respect of either the mother (by 9 votes to 6) or the daughter (unanimously). The Court agreed that 'family life' not only includes 'social, moral or cultural relations', but 'also comprises interests of a material kind', including those of intestate succession and gifts. But Article 8 did not mean that a State had to ensure that all children were entitled to a share in their parents' or other relatives' estates on intestacy or to a share in any gifts made by will or *inter vivos*; similarly, from the mother's standpoint, Article 8 did not prevent a State from imposing any limitation on her right to give property to her children. 'Respect' for family life in Article 8 meant only that a State must not act in a manner so as not to allow everyone to lead a normal family life, and the rules of Belgian law concerning the patrimonial rights of the members of an 'illegitimate family' did not infringe this obligation. But when Article 8 was read in conjunction with Article 14, the position was different. The Court held, by 13 votes to 2, that these provisions taken together were infringed in respect both of the mother and of the daughter. Whereas the State was free to control or limit the rights of entitlement to property within the family subject to the obligation indicated above, there was no justifiable reason for distinguishing between 'legitimate' and 'illegitimate' families when doing so.

The Court then considered whether the right to the 'peaceful enjoyment' of one's possessions protected by Article 1 of the First Protocol was infringed by Belgian law as to patrimonial rights. It held unanimously that Article 1 did not apply to the daughter's situation because Article 1 concerned only existing possessions; it did not guarantee a right to acquire others. As far as the mother was concerned, the Article applied to her, the Court held, by 10 votes to 5, since the 'peaceful enjoyment' of one's possessions included the right to dispose of them. None the less, there was no breach of that Article in respect of the mother, the Court held by 9 votes to 6. This was because Article 1 permitted a State an absolute discretion to 'enforce such laws as *it* deems necessary to control the use of property in accordance with the national interest' (*italics added*). The Court, therefore, could not question the controls imposed by Belgium. There had, however, the Court held, by 10 votes to 5, been a breach of Article 1 when read with Article 14 of the Convention. Here too, there could be no justification for discriminating against unmarried mothers in the freedom to dispose of their property.

The Court unanimously rejected allegations based upon Articles 3 and 12. As far as Article 3 was concerned, although the applicants might be subject to some humiliation, this was not sufficiently serious to amount to 'degrading treatment'. The Court could see no argument worth considering based upon Article 12.

Finally, the Court held, by 9 votes to 6, that its findings in favour of the appli-

cants were by themselves sufficient remedy; there was no need for action under Article 50.

Of the several dissenting judgments, two are of particular interest. In a joint dissenting opinion, six judges—Balladore Pallieri, Pedersen, Ganshof van der Meersch, Evrigenis, Pinheiro Farinha and Garcia de Enterría—disagreed with the Court's holding that merely finding that the Convention had been infringed was a sufficient remedy. In their view, the 'moral damage' suffered by the applicants was such that the token satisfaction which they had requested—one Belgian franc each—ought to have been awarded. Judge Sir Gerald Fitzmaurice dissented from all of the Court's holdings that were not unanimous with the exception of the holding denying satisfaction under Article 50. He did so on the basis that Article 8 of the Convention and Article 1 of the First Protocol had been too widely interpreted by the Court and did not apply to the applicants' claims. He was also of the opinion that even if they did apply (i) the Belgian law in question was not unreasonable (so that it should benefit from the 'margin of appreciation' doctrine) and (ii) the applicants were not 'victims' who could bring a claim since they had suffered, at worst, in no more than a 'purely or largely formal, nominal, remote, or trivial way'. On the scope of Article 8, he took the view that Article 8 was concerned only with questions of 'interference' (see the wording of Article 8 (2)) with family *life* by the State; it did not also concern questions of civil status regulated by family *law*:

It is abundantly clear (at least it is to me)—and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view—that the main, if not indeed the sole object and intended sphere of application of Article 8, was that of what I will call the 'domiciliary protection' of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delayings and confiscation of correspondence; to the planting of listening devices (buggings); to restrictions on the use of radio and television; to telephone tapping and disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another—in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8, and it was for the avoidance of these horrors, tyrannies and vexations that 'private and family life . . . home and . . . correspondence' were to be respected, and the individual endowed with a right to enjoy that respect—not for the regulation of the civil status of babies.

In Judge Sir Gerald Fitzmaurice's view, the Court's judgment was 'little else but a misguided endeavour to read—or rather introduce—a whole code of family law into Article 8 of the Convention, thus inflating it in a manner, and to an extent, wholly incommensurable with its true and intended proportions'. As far as Article 1 of the First Protocol was concerned, 'the chief, if not the sole' object of Article 1 of the Protocol was to prevent the confiscation or other arbitrary interference with property rights by the State; it had nothing to do with the transfer of property.

The Court's decision is in keeping with the modern approach in Western Europe to the status of illegitimate children, as evidenced by the European Convention on the Legal Status of Children born out of Wedlock, to which the Court refers. A bill which would bring Belgian law into line with the decision was submitted by the Belgian

Government to the Senate in 1978 while the case was pending. The English law on illegitimacy was recently examined by the Law Commission.¹ It concluded that despite the considerable improvements on the common law position that had been made by a number of statutes over the years, 'there remain areas where the child born out of wedlock, and his father, are discriminated against as a matter of substantive law' and there were still some 'procedural distinctions'.² The Commission considered that 'the status of illegitimacy should be abolished and that the law hitherto applicable to legitimate children should apply to all children without distinction'.³ Legislation based on this principle would clearly comply with the Convention.

The *Marckx* case is of importance beyond its immediate context of illegitimacy because of the almost unanimous ruling of the plenary Court that Article 8 has a positive private law aspect as well as a negative public law one. This was at once relied upon by a Chamber of the Court as the basis for a finding of a breach of Article 8 in the *Airey* case (below). It *could* be used to require States to take steps to prevent invasions of privacy and family life by *private* persons as well as refraining from interference itself. Although Sir Gerald Fitzmaurice was the only judge to dissent from the Court's judgment on the 'positive aspect' issue, the extract from his judgment quoted above probably reflects the intentions of the drafters of Article 8 better than does the wider reading adopted by the Court. None the less, this does not place the European Court of Human Rights apart from other (albeit national) courts entrusted with the enforcement of a bill of rights. The United States Supreme Court, for example, has more than once given the American Bill of Rights a meaning demonstrably contrary to that intended by its drafters in response to changing social needs or values.

The Court does not refer to the European Social Charter.⁴ The Committee of Independent Experts (though not with the agreement of the Governmental Committee) has taken the view that the legal status of children born out of wedlock is a matter within Article 17 of the Charter. The Committee found the United Kingdom to be in breach of Article 17 before the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 and the Family Law Reform Act 1969 sufficiently improved the inheritance rights of illegitimate children. These Acts do not apply to the Isle of Man and the Committee has continued to find the United Kingdom in breach of Article 17 because of this.⁵ The difference between infringements of the Convention and of the Charter is, of course, that there is no right of petition in respect of the latter.

Right to legal aid in judicial separation proceedings (Article 6 (1))—right to private or family life (Article 8)

*Case No. 3. Airey case.*⁶ In this case the Court held that Ireland had infringed Article 6 (1) by not providing legal aid in judicial separation proceedings. It also held that the

¹ Law Commission, Working Paper No. 74, *Family Law: Illegitimacy* (1979).

² *Ibid.*, p. 13.

³ *Ibid.*, p. 149.

⁴ *United Kingdom Treaty Series*, No. 38 (1965) (Cmd. 2643).

⁵ Committee of Independent Experts, *Conclusions VI* (1979), p. 107. The Acts do not apply to Northern Ireland either, but Northern Irish law has been brought into line with them: Inheritance (Provision for Family and Dependents) N.I. Order 1979, S.I. 1979 No. 924 (N.I. No. 8).

⁶ A. 6323/73. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 20 (1977), p. 180. Report of the Commission adopted on 9 March 1978. E.C.H.R., Judgment of 9 October 1979. English and French texts authentic. The Court consisted of the following Chamber of Judges: Wiarda (President); O'Donoghue, Thor Vilhjálmsón, Ganshof van der Meersch, Evrigenis, Liesch and Gölcüklü (Judges).

same omission was a breach of the right to private and family life in Article 8. The Court held that there was no need to examine claims based upon Articles 13 and 14.

The applicant, an Irish national, claimed that her husband was an alcoholic and had, while living with her, frequently threatened her with violence. In 1972, he was convicted of assaulting her and thereafter, after nearly twenty years of marriage, left the matrimonial home. For about eight years before that time, the applicant had unsuccessfully sought to persuade her husband to conclude a separation agreement. Since his desertion, she had consulted solicitors with a view to obtaining a decree of judicial separation from the Irish High Court on grounds of physical and mental cruelty but, being poor and in the absence of a system of legal aid, had been unable to find a solicitor willing to act for her. Under Irish law, divorce is not allowed; spouses may, however, be relieved of the duty to cohabit by a separation agreement made between themselves or by a judicial separation order. The latter may be granted at the request of one of the parties to the marriage who proves that the other has committed one of a number of matrimonial offences. An individual against whom a judicial separation order is made forfeits certain rights of succession to his or her spouse's estate. -

The Commission expressed the opinion unanimously that Ireland's failure to provide the applicant with legal aid was a breach of the right of access to the courts which it had been held in the *Golder* case¹ was implicit in Article 6 (1). The Commission referred the case to the Court.

The Court reached the same conclusion, by 5 votes to 2. The Irish Government did not dispute that the applicant's 'civil rights and obligations' were in issue in judicial separation proceedings. Marital rights and duties were clearly matters of private law. The only real question was whether the right of access guaranteed by Article 6 (1) was violated when the applicant was perfectly free to take her case to the High Court in person, or through a lawyer if she could afford one. In the Court's opinion, the right of access meant a right of *effective* access, and this required in the applicant's case the provision of legal aid. The Court emphasized that it did not follow from its ruling that legal aid should be provided in all civil proceedings for indigent persons. The particular circumstances that meant that it was required in the present case were indicated by the Court as follows:

It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.

In Ireland a decree of judicial separation is not obtainable in a District Court, where the procedure is relatively simple, but only in the High Court. A specialist in Irish family law, Mr. Alan J. Shatter, regards the High Court as the least accessible court not only because 'fees payable for representation before it are very high' but also by reason of the fact that the procedure for instituting proceedings . . . is complex particularly in the case of those proceedings which must be commenced by a petition', such as those for separation (*Family Law in the Republic of Ireland*, Dublin 1977, p. 21).

Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have [to be] tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

¹ E.C.H.R., Judgment of 21 February 1975.

The Court found corroboration for its view in the fact that in 'each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer'. The Court was not persuaded by the argument that by its judgment it was imposing an economic burden on States and that in doing so it might be said to be going against the grain of a guarantee of civil and political (as opposed to economic and social) rights by requiring States to take positive action to improve the lot of their inhabitants rather than just to refrain from interference with their rights:

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals . . . Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.

Two judges, Judges O'Donoghue (Irish) and Thor Vilhjálmsson (Icelandic), dissented. Judge O'Donoghue stressed mainly that the applicant was perfectly free to take her case to the High Court in person. He was also not satisfied that she would have needed legal representation to win. Judge Thor Vilhjálmsson did not consider that it was the function of the Court to promote economic and social development, however commendable this might be, by reading into the Convention an obligation to provide legal aid in civil proceedings that was not clearly stated in it.

The Commission had found it unnecessary to consider in its report whether Article 8 had been violated as well on the same facts. The Court did consider the question (which was argued before it by the Principal Delegate for the Commission) and held, by 4 votes to 3, that there had been a breach of Article 8 as well. Although the State had not 'interfered' with the applicant's private or family life, Article 8, as the plenary Court had said in the *Marckx* case (above), imposes some positive obligations too:

In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together.

Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court, she was unable to seek recognition in law of her *de facto* separation from her husband. She has therefore been the victim of a violation of Article 8.

Judges O'Donoghue and Thor Vilhjálmsson were joined by Judge Evrigenis in dissenting from the holding on Article 8. For the first two judges, their dissents followed automatically from their dissents on Article 6. For Judge Evrigenis, the case disclosed a violation that went not to the substance of the right protected by Article 8 'but to its procedural superstructure and is, therefore, covered and absorbed by Article 6 (1)'.

The Court held, by 4 votes to 3 in each case, that it was not necessary to consider the applicant's complaints based upon Article 13 (effective national remedy) and Article 14 (as read with Article 6). The Court held unanimously that the question of just satisfaction under Article 50 was not yet ready for examination.

The Court's judgment in this case indicates another aspect of the right to a fair trial in civil proceedings, which is defined only in general terms in Article 6 (1). Relying on the right of access to the courts read into Article 6 (1) in the *Golder* case, the Court has interpreted Article 6 (1) as guaranteeing a right to legal aid in some kinds of civil cases. The decision is clearly not limited to judicial separation proceedings; there must be other kinds of civil proceedings in which the need for legal aid is just as great. The Court's rejection of the Irish Government's argument based upon the economic implications of the right to legal aid is consistent with the theory of the Convention. Several of the 'civil', as opposed to 'economic' or 'social', rights protected by it inevitably require the expenditure of public money and not just non-interference. The provision of a court system to conduct trials complying with Article 6 is an obvious example. The Irish Government, which ratified the Convention subject to a reservation to the legal aid obligation in *criminal* cases specifically imposed by Article 6 (3), clearly did not anticipate any comparable obligation in respect of civil proceedings. This is a situation in which States are increasingly likely to find themselves as the Court develops the meaning of the Convention.

The Court's decision on Article 8 was taken by the narrowest of majorities. The reasoning justifying it, which is fully quoted above, does not seem very convincing. The argument of Judge Evrigenis that the case concerned a procedural matter which came properly and exclusively within Article 6 is more persuasive.

Detention of mental patients under Article 5 (1) (e)—provision of a remedy to challenge the legality of detention (Article 5 (4))—meaning of 'civil rights and obligations' in Article 6 (1)

*Case No. 4. Winterwerp case.*¹ The Court held that the Netherlands had infringed the Convention by not providing the applicant with the necessary remedy to challenge his detention as a mental patient (Article 5 (4)) and by depriving him of the legal capacity to deal with his property without a fair trial (Article 6 (1)). The Court rejected a claim that the applicant's detention violated Article 5 (1).

The applicant, a Dutch national, had received voluntary treatment in a psychiatric hospital in 1967. The following year he was committed to the hospital for detention on the direction of the local burgomaster under the 'emergency procedure' provided by the Dutch Mentally Ill Persons Act 1884. The direction was made after the applicant was found lying naked in a police cell following his arrest on a charge of theft. Under the procedure as it then applied, the burgomaster was not required to, and in the applicant's case did not, obtain prior medical advice if the circumstances did not permit. The burgomaster's decision was valid for three weeks but could be, and in the applicant's case was, extended by the Public Prosecutor for a further three weeks.

¹ A. 6301/73. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 18 (1975), p. 192. Report of the Commission adopted 15 December 1977. E.C.H.R., Judgment of 24 October 1979. English text authentic. The Court consisted of the following Chamber of Judges: Pedersen (President); Wiarda, Evrigenis, Teitgen, Lagergren, Liesch and Gölcüklü (Judges).

While the applicant was detained under the 'emergency procedure', his wife made an application in 1968 to the local District Court for a 'provisional detention' order on the statutory grounds that his detention was in his own interest and that of public order. The application was supported, as required by law, by a medical declaration by a general practitioner or a psychiatrist. In the applicant's case, the declaration was by a general practitioner who had not met the applicant before he examined him for the purposes of the declaration. The Court granted the application, authorizing the applicant's provisional detention for a period of six months. It did so without, in its discretion, hearing the applicant or seeking expert medical advice. Later in 1968, during the six-month period, the order was replaced by a one-year detention order issued by the competent Regional Court at the applicant's wife's request and on the basis of expert medical evidence indicating schizophrenic and paranoiac symptoms. Again, the applicant was not heard. Thereafter the order was renewed annually by the competent Regional Court.

Between 1969 and 1973, the applicant made four requests for his release, using the procedure provided by law. The first was referred by the Public Prosecutor, in his discretion, to the Regional Court which, after hearing the applicant, rejected it. The remaining three were rejected by the Public Prosecutor as having no merit without being referred to the Court and without any hearing of the applicant.

A consequence of the applicant's detention as a mental patient was that he lost, by operation of law, the legal capacity to administer his property.

The Commission expressed the unanimous opinion in its report that the above facts gave rise to a breach of Article 5 (4), but not of Article 5 (1). It did not express an opinion on Article 6 (1) because no detailed argument had been presented to the Commission on it. The case was referred to the Court by the Commission.

The Court unanimously rejected the applicant's contention that his detention was contrary to Article 5 (1) (e).¹ On the meaning of 'persons of unsound mind', the Court noted that this term, which is not defined in the Convention, 'is not one that can be given a definitive interpretation'; its meaning is 'continually evolving as research in psychiatry' progresses. But what was always true, although this was not an issue on the facts of the case, was that Article 5 (1) (e) 'cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society'. Like the Convention, Dutch law did not define a 'mentally ill person'. Examining Dutch law and practice concerning the detention of 'mentally ill persons', the Court concluded that an individual who is detained under Dutch law 'in principle falls within the ambit of Article 5 (1) (e)'.

The applicant's detention was also 'lawful'. This term in Article 5 (1) (e) meant conformity (i) with the applicable domestic law (both as to the grounds for detention *and* the procedure to be followed) and (ii), as Article 18 of the Convention confirmed, with the purpose of the restriction on freedom of the person allowed by Article 5 (1) (e). It also meant that the detention must not be arbitrary, i.e. it must be based upon objective and reliable medical evidence:

... In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority—that is, a true mental disorder—calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.

¹ This permits 'the lawful detention of . . . persons of unsound mind'.

The Court held that the applicant's detention was 'lawful', although not without 'some hesitation' as to the length of the initial period of emergency detention (six weeks).

Similarly, the applicant's detention had been 'in accordance with a procedure prescribed by law'. This wording in the introductory part of Article 5 (1) meant mainly that the procedures set by the domestic law had to be complied with. But it meant also that the domestic law must 'itself be in conformity with the Convention, including the general principles expressed or implied therein', which in this case meant that a 'fair and proper procedure' had to be followed. The Court considered that this 'general principles' requirement had been complied with. Reviewing Dutch law, it also decided that the procedures followed had not, as the applicant had alleged, contravened Dutch law.

The Court had interpreted Article 5 (4) earlier in the *Vagrancy* cases.¹ There it had stated:

Where the decision depriving a person of his liberty is one taken by an administrative body . . . Article 5 (4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 (4) is incorporated in the decision; . . .

In the present case, although the decision by the burgomaster was clearly an administrative one, Article 5 (4) could be complied with at the point when the detention was authorized if the District or the Regional Court could be regarded as a 'court' for the purposes of Article 5 (4). In the Court's opinion, neither could. Organizationally they clearly were courts but, as the Court had also said in the *Vagrancy* cases, the procedure followed by a 'court' must offer the 'fundamental guarantees of procedure applied in matters of deprivation of liberty'. One such guarantee was 'the opportunity to be heard either in person or, where necessary, through some form of representation'. In this case, the applicant was not notified of the proceedings leading to the various detention orders against him or of their outcome. Nor was he given an opportunity to argue his case.

None the less, the situation could be saved, the Court agreed, if the proceedings for handling the applicant's requests for discharge involved a ruling on the legality of his detention by a 'court' in the sense of Article 5 (4). In that situation, Article 5 (4) would be complied with in the way appropriate when the initial decision to detain is taken administratively, and not by a 'court'. The Court considered that the requirements of Article 5 (4) were met in respect of the applicant's first request in 1969 since the Regional Court did hear the applicant in person before making its decision. But the Court took the view that in the case of detention under Article 5 (1) (e), Article 5 (4) required the existence of a means of challenging the legality of the detention not just once but on a continuing basis at reasonable intervals. This was so because the mental condition of the detained person might improve. In the applicant's case, his three later requests were not referred by the Public Prosecutor (who was clearly not a 'court') to the Regional Court for determination. It followed, the Court held, unanimously, that Article 5 (4) had not been complied with.

The Court also held, unanimously, that Article 6 (1) had been infringed in that the applicant had been deprived of his capacity to administer his property because of his confinement in a psychiatric hospital. There was little doubt that the 'fair hearing'

¹ E.C.H.R., Judgment of 18 June 1971, para. 76.

requirements of Article 6 (1) had not been complied with. This was so both when the burgo-master had issued his direction and, for the same reasons as those which indicated that Article 5 (4) had not been complied with, when the District and Regional Courts took their decisions. Moreover, such hearings as had occurred had been addressed solely to the question of detention; no hearing at all had been held on the question whether the applicant should lose his capacity to administer his property, this consequence following automatically from the decision to detain him. Although it might often be justifiable to take a detained mental patient's civil capacity from him, this ought only to be done after a 'fair hearing'. But the crucial question was whether Article 6 (1) applied. The Government argued that it did not; that what was in issue was a question of status rather than one of 'civil rights and obligations'. The Court disagreed:

The capacity to deal personally with one's property involves the exercise of private rights and hence affects 'civil rights and obligations . . .'. Divesting Mr. Winterwerp of that capacity amounted to a 'determination' of such rights and obligations.

The Court held, unanimously, that the question of the application of Article 50 was not ready for decision.

The Court's unanimous judgment on Article 5 (4) is consistent with its judgment in the *Vagrancy* cases. Dutch law on the detention of mental patients was altered in some respects in 1972, after the applicant's case had arisen, and a Bill to reform the law to provide further procedural guarantees was pending before Parliament when the Court gave judgment. The Court's holding on Article 6 could have implications in other areas in which a person's civil capacity is automatically reduced by reason of his detention. Thus in the United Kingdom, a convicted prisoner is not permitted to run a business from prison,¹ although he may grant a power of attorney. There are also restrictions on the granting of permission to marry.² The case is also notable as being the first in which a State that was not a party to it was permitted to intervene. The Court allowed the United Kingdom permission to submit a written statement on the interpretation of Article 5 (4).

Meaning of 'officer authorized by law to exercise judicial power' (Article 5 (3))

*Case No. 5. Schwiesser case.*³ In this case, the Court ruled that a District Attorney (*bezirksanwalt*) in the Swiss legal system qualified as an 'officer authorized by law to exercise judicial power' for the purposes of Article 5 (3).

The applicant, a Swiss national, gave himself up to the Swiss police in connection with criminal charges. He was taken at once before the competent District Attorney who, after hearing the applicant's story (but without his lawyer being present), on the same day ordered his detention on remand (*untersuchungshaft*) on suspicion of having

¹ Rule 34 (8), Prison Rules.

² *Hansard*, H.L. Debs., vol. 387, col. 1353 (1 December 1977). See also the *Hamer* case, *Decisions and Reports of the European Commission of Human Rights*, 10 (1978), p. 174, in which the applicant prisoner is claiming against the United Kingdom for an infringement of the Article 12 guarantee of the right to marry.

³ A. 7710/76. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 20 (1977), p. 574. Report of the Commission adopted on 9 March 1978. E.C.H.R., Judgment of 4 December 1979. French text authentic. The Court consisted of the following Chamber of Judges: Balladore Pallieri (President); Zekia, Ryssdal, Bindschedler-Robert, Evrigenis, Teitgen and Matscher (Judges).

committed several offences of aggravated theft. He was detained because it was thought that he might suppress evidence if released. The applicant's appeal to the Zurich Public Prosecutor (*staatsanwalt*) was unsuccessful. He appealed further to the Swiss Federal Court, arguing, *inter alia*, that the District Attorney was not 'an officer authorized by law to exercise judicial power' within the meaning of Article 5 (3) of the Convention, which is a part of Swiss law. His appeal on this and other grounds was dismissed three months after his arrest.

The Commission expressed the opinion in its report, by 9 votes to 5, that the applicant's complaint that he had not been brought before 'a judge or other officer authorized by law to exercise judicial power' upon his arrest as required by Article 5 (3) was not a good one. The case was referred to the Court by the Commission and the Government.

The Court agreed with the Commission, holding, by 5 votes to 2, that there had been no breach of Article 5 (3). The Court indicated the meaning of the term 'officer' in Article 5 (3) as follows:

To sum up, the 'officer' is not identical with the 'judge' but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.

The first of such conditions is independence of the executive and of the parties . . . This does not mean that the 'officer' may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.

In addition, under Article 5, para. 3, there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him . . . the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons . . .

Judges Ryssdal and Evrigenis dissented. In their view, the District Attorney was not sufficiently independent of the prosecuting authorities to satisfy the requirements of Article 5 (3).

Considering then the position of the District Attorney, the Court noted, in terms of his independence of the executive, that he acted in certain cases as a prosecuting, as well as an investigating, authority and that he is 'subordinate to the Public Prosecutor's Office and, through that Office, to the Department of Justice and the Government of the Canton of Zurich'. It pointed out, however, that in the present case, the District Attorney acted solely as an investigating authority and had, in accordance with the usual practice, taken his decision to detain the applicant in complete independence. In respect of the procedure followed, the Court noted that the District Attorney had heard the applicant in person before ordering his detention. Although he had not heard the applicant's lawyer, it was not required by Article 5 (3) that he should hear him. Finally, in terms of the 'substantive guarantee' to which the Court refers in the passage quoted above, the Court noted that the District Attorney took his decision on the basis of the rules as to remand in custody in the Swiss Code of Criminal Procedure. Accordingly, the Court concluded that the District Attorney was competent to exercise the function indicated in Article 5 (3).

D. J. HARRIS

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1978*

Human rights—discrimination on grounds of sex—equal pay and other terms of employment

*Case No. 1. Defrenne v. Sabena (No. 2).*¹ Miss Defrenne worked as an air hostess for the Belgian airline Sabena until she was forced to retire in 1968 under a clause in her contract of employment which provided that air hostesses had to retire at the age of forty. Male cabin stewards, although performing the same duties as air hostesses, were not required to retire at the age of forty. Miss Defrenne sued Sabena in a Belgian court, claiming that this difference of treatment constituted unlawful discrimination. The Belgian Court of Cassation asked the Court of Justice of the European Communities, under Article 177 of the E.E.C. Treaty, to decide whether such differences of treatment were contrary to Community law.

Article 119 of the E.E.C. Treaty provides:

Each member State shall . . . ensure . . . the application of the principle that men and women should receive equal pay for equal work.

For the purposes of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. . . .

The Court of Justice of the European Communities ruled that Article 119 only required equal pay, and did not require equality as regards other terms of employment. Terms of employment which required female employees to retire earlier than male employees might *indirectly* have financial consequences (e.g. by reducing the size of pensions based on length of service), but that was not enough to bring them within the scope of Article 119. Action taken by member States or by Community institutions to implement the more general policy laid down in Article 117² could provide a means of outlawing such inequalities; but Article 117, unlike Article 119, is not directly applicable, and therefore confers no rights on individuals in the absence of implementing action by member States or Community institutions.

The second part of the question by the Belgian Court of Cassation asked 'whether, apart from the specific provisions of Article 119, Community law contains any general principle prohibiting discrimination based on sex as regards the conditions of employment and working conditions of men and women'. The Court of Justice of the European Communities replied:

The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure.

There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.

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¹ [1978] E.C.R. 1365. For *Defrenne v. Sabena (No. 1)*, see [1976] E.C.R. 455 and this *Year Book*, 48 (1976-7), p. 404.

² Article 117, first paragraph, provides: 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.'

Moreover, the same concepts are recognized by the European Social Charter of 18 November 1961 and by Convention No. 111 of the International Labour Organization of 25 June 1958 concerning discrimination in respect of employment and occupation. . . .

On the other hand, as regards the relationships of employer and employee which are subject to national law, the Community had not, at the time of the events now before the Belgian courts,¹ assumed any responsibility for supervising and guaranteeing the observance of the principle of equality between men and women in working conditions² other than remuneration.

As has been stated above, at the period under consideration Community law contained only the provisions in the nature of a programme laid down by Article 117 . . . of the Treaty, which relate to the general development of social welfare, in particular as regards conditions of employment and working conditions.

It follows that the situation before the Belgian courts is governed by the provisions and principles of internal and international law in force in Belgium.

The reply to the second part of the question must therefore be that at the time of the events which form the basis of the main action there was, as regards the relationships between employer and employee under national law, no rule of Community law prohibiting discrimination between men and women in the matter of working conditions other than the requirements as to pay referred to in Article 119 of the Treaty.

The general principle of Community law that fundamental personal human rights must be respected has two important consequences: rules of Community law must be interpreted, where possible, so as not to violate such rights,³ and acts of Community institutions which violate such rights are invalid. But it does *not* have the consequence of extending the *scope* of Community law; in areas of law which are not subject to Community law, violations of human rights by member States are not violations of *Community* law, even though they may be violations of the European Convention on Human Rights or some other rule of *international* law.

Statements by the Court that it is a general principle of Community law that fundamental personal human rights must be respected do not, by themselves, provide a detailed list of such rights; such a list can only emerge slowly and piecemeal from a long series of cases. The present case makes it clear that equality between men and women as regards terms of employment is one of those rights.⁴ Indeed, the Court's statement that 'the elimination of discrimination based on sex forms part of those fundamental rights' could even be interpreted as prohibiting *all* discrimination (not merely discrimination as regards terms of employment) between men and women; however, if the Court did intend to lay down a rule as wide as that, its judgment lacks firm foundations. In earlier cases the Court had said that fundamental human rights were to be found in the Constitutions and constitutional traditions of member States, and in

¹ Miss Defrenne retired in 1968, and the case therefore had to be judged under Community law as it existed in 1968. In 1976 the Council of the European Communities adopted Directive No. 76/207 (*Official Journal*, L39/40), which was partly based (by implication) on Article 117 of the E.E.C. Treaty, and which prohibited various kinds of discrimination between male and female employees; but the Directive is not retroactive, and was therefore not relevant to the present case.

² It is clear from the context that the Court meant 'terms of employment', and not merely 'working conditions' in the sense of the physical environment in which work is done.

³ Mr Advocate General Capotorti confined this conclusion to rules of Community law which are directly applicable ([1978] E.C.R. 1365, 1385); *sed quaere*.

⁴ In earlier cases, such as *Sabbatini (née Bertoni) v. European Parliament*, [1972] E.C.R. 345, the Court had refused to apply provisions of the Community's Staff Regulations which discriminated against female officials; but it was unclear whether the basis of those judgments was Article 119 or some wider principle. See this *Year Book*, 46 (1972-3), p. 447.

treaties for the protection of human rights to which member States were parties.¹ It is true that national laws, constitutions and constitutional traditions, and treaties on human rights, prohibit many kinds of discrimination between men and women; but it is going too far to say that they prohibit *all* kinds of discrimination between men and women.²

General principle of equality—discriminatory regulations are invalid—agriculture

*Case No. 2. Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce.*³ Deciding between competing claims of different economic groups is often assumed to be a wholly political act, in which judges have no part to play. Yet, even in a context as politically sensitive as the Common Agricultural Policy of the E.E.C., the Court of Justice of the European Communities has shown that such political acts can be subject to judicial review.

Article 39 (1) of the E.E.C. Treaty provides:

The objectives of the common agricultural policy shall be:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilise markets;
- (d) to assure the availability of supplies;
- (e) to ensure that supplies reach consumers at reasonable prices.

In *Balkan-Import-Export G.m.b.H. v. Hauptzollamt Berlin-Packhof* the Court said:

In pursuing these objectives, the Community institutions must secure the permanent harmonization made necessary by any conflicts between these aims taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.⁴

This passage implies that it would be unlawful for Community institutions to pursue some of these objectives at the *total* and *permanent* expense of the other objectives (as opposed to merely giving temporary priority to some objectives over others). But it is unlikely that the Court would hold an agricultural regulation invalid on such grounds, except in extreme cases of a type which has not yet come before the Court.⁵

¹ *This Year Book*, 48 (1976-7), p. 401.

² *This Year Book*, 46 (1972-3), pp. 447-8; F. G. Jacobs, *The European Convention on Human Rights* (1975), pp. 188-93.

It could be argued that the very general principle of equality which the Court of Justice of the European Communities has applied in several cases (see below, pp. 277-9) can be used to require equality between men and women. But the general principle of equality requires that similar cases shall not be treated differently, without providing detailed guidance for the interpretation of 'similar'; to assume that women are 'similar' to men for all purposes (and not merely for the purpose of employment) is to assume the very thing which needs to be proved.

³ [1978] E.C.R. 2037.

⁴ [1973] E.C.R. 1091, 1112. The Court has placed a similar interpretation on other provisions which require simultaneous pursuit of several different objectives, e.g. Articles 2 and 3 of the E.C.S.C. Treaty (*Netherlands v. Commission*, [1968] E.C.R. 1).

⁵ In national political systems, control over ministerial policy is usually exercised by parliaments, not by courts. But the weakness of the European Parliament provides some justification for the adoption by the Court of Justice of the European Communities of a bolder role; cf. *Wilhelm Werhahn Hansamühle v. Council*, [1973] E.C.R. 1229, 1260.

Article 40 (3), second sub-paragraph, of the E.E.C. Treaty provides that the common organization of agricultural markets under the Common Agricultural Policy 'shall exclude any discrimination between producers or consumers within the Community'. Unlike Article 39 (1), this provision does not prohibit discrimination against producers for the benefit of consumers, or discrimination against consumers for the benefit of producers; what it prohibits is discrimination against some producers for the benefit of other producers, and discrimination against some consumers for the benefit of other consumers.¹ Within its own sphere of application, Article 40 (3) lays down a precise rule which leaves far less to the discretion of the Council and Commission than Article 39 (1) does, so it is not surprising that the Court has shown itself readier to hold regulations invalid for breach of Article 40 (3) than to hold regulations invalid for breach of Article 39 (1).

One of the most interesting cases on Article 40 (3) is *Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce*,² which concerned isoglucose, a liquid sweetener made from starch, which was almost unknown in Europe before 1976, but which now competes with liquid sugar. In 1975 the Council of the European Communities enacted a regulation which provided for production refunds (a form of subsidy) to be granted to manufacturers of starch derived from cereals, to enable them to compete with manufacturers of starch derived from substitute chemical products. In 1976 the Council amended this regulation by providing that starch used for making isoglucose would no longer be eligible for the production refund, and in 1977 the Council imposed a levy on the production of isoglucose; national authorities were given the task of implementing these regulations, by collecting the production levy and by claiming back the sums paid as production refunds.³ The plaintiffs, who manufactured isoglucose, sued the Intervention Board for Agricultural Produce, an organ of the British government, in the English High Court, seeking a declaration that the Board had no right to implement the regulations of 1976 and 1977 because those regulations were invalid. The High Court referred the question of the validity of those regulations to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the E.E.C. Treaty.

The plaintiffs argued that Regulation 1862/76, which abolished the production refund on starch used for isoglucose, was contrary to Article 40 (3) because it treated isoglucose less favourably than other starch products, which continued to enjoy the production refund.

¹ *Balkan-Import-Export G.m.b.H. v. Hauptzollamt Berlin-Packhof*, [1973] E.C.R. 1091, 1113. Monetary compensation amounts and the artificial rates of exchange for 'green' currencies, which preserve different levels of agricultural prices in different member States, 'may appear as discriminatory', but they are lawful because they are designed to alleviate the dislocation caused by alterations in exchange rates; if they did not exist, such dislocation 'would result in much more serious, obvious and general discrimination [e.g. by giving an unfair advantage to farmers in States whose currencies had been devalued]. Although it is not without certain drawbacks, the adoption of the system of the so-called green exchange rates is therefore justified by the prohibition on discrimination and the requirements of a common agricultural policy' (*Stölting v. Hauptzollamt Hamburg-Jonas*, [1979] E.C.R. 713, 722-3, 730-1).

² [1978] E.C.R. 2037.

³ The production refunds subsidized the manufacture of starch. At the time when the starch was manufactured and the refunds were paid, it was impossible to tell whether the starch would be used for making isoglucose or whether it would be used for some other purpose. The solution adopted was to pay production refunds to all manufacturers of starch, and then, if the starch was used for making isoglucose, to claim the production refund back from the isoglucose manufacturer.

Article 40 (3) prohibits discrimination between producers. In *Albert Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen* the Court said:

Whilst this wording undoubtedly prohibits any discrimination between producers of the same [primary] product, it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the afore-said provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.¹

The Court did not make clear whether it was interpreting Article 40 (3) broadly, in the light of the general principle of equality, or whether it was applying that principle independently of Article 40 (3); the result would be the same in either case, but it is probably better to regard the general principle of equality as an independent source of law, since the Court has also applied it in other contexts which have nothing to do with Article 40 (3).² The general principle of equality can be regarded as derived either from the laws of the member States³ or (in contexts such as the present) from Article 3 (f) of the E.E.C. Treaty, which provides that the activities of the Community shall include the institution of a system ensuring that competition in the common market is not distorted.

In *Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce* the Court repeated its earlier statement in the *Ruckdeschel* case that the prohibition of discrimination in Article 40 (3) 'is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law', which 'requires that similar situations shall not be treated differently unless the differentiation is objectively justified'. The Court then applied this principle to the facts of the case, starting with Regulation No. 1862/76 which had withdrawn the production refund for isoglucose.

It must be ascertained whether isoglucose is in a situation comparable to that of other products of the starch industry, in particular in the sense that they can be substituted for isoglucose in the specific use to which the latter product is normally put.

It is clear that there is no competition . . . between isoglucose and the other products derived from starch . . .

Furthermore as isoglucose is a product which is at least partially interchangeable with sugar, the maintenance of the production refund in favour of manufacturers of isoglucose might . . . have constituted discrimination against manufacturers of sugar who . . . do not enjoy [a production refund].

Hence . . . Regulation No. 1862/76 does not infringe the rule of non-discrimination

¹ [1977] E.C.R. 1753, 1769.

² Schermers, *Judicial Protection in the European Communities* (1976), pp. 46-8; *Moulijn v. Commission*, [1974] E.C.R. 1287; *Jänsch v. Commission*, [1977] E.C.R. 1817; *N.T.N. Toyo Bearing Manufacturers Co. Ltd. v. Council and Commission*, [1979] E.C.R. 1185, 1209, 1249-50. See also above, pp. 273-5, and the cases cited by Mr Advocate General Capotorti in the *Ruckdeschel* case, [1977] E.C.R. 1753, 1777-80.

³ *Per* Mr Advocate General Capotorti in the *Ruckdeschel* case, [1977] E.C.R. 1753, 1777. In English law, bye-laws made by local authorities are liable to be held invalid if they are 'partial and unequal in their operation as between different classes' (*Kruse v. Johnson*, [1898] 2 Q.B. 91, 99-100; on the appropriateness of treating E.E.C. regulations in the same way as local authority bye-laws for the purposes of determining the scope of judicial review, see this *Year Book*, 48 (1976-7), pp. 401-3).

between Community producers set out in the second sub-paragraph of Article 40 (3) of the Treaty.¹

On the other hand, 'the provisions of Regulation No. 1111/77 establishing the production levy system for isoglucose offend against the general principle of equality of which the prohibition on discrimination set out in Article 40 (3) of the Treaty is a specific expression'. The Community had a surplus of sugar, and sugar producers had to pay a production levy to finance disposal of the surplus. Since isoglucose was a substitute for sugar and sales of isoglucose within the Community aggravated the sugar surplus, the Council of the European Communities decided that isoglucose producers should contribute to the cost of disposing of the sugar surplus by paying a levy similar to the levy paid by sugar producers. But isoglucose producers had to pay the levy on all their production, while sugar producers had to pay it on less than 26 per cent of their production; isoglucose producers were thus treated more harshly than sugar producers, even though the maximum rate of the isoglucose levy was just over half the rate of the sugar levy. The Court considered various alleged justifications for this difference of treatment, but held that they were all unfounded.

Some general comments on the principle of equality may help to clarify its meaning. The principle does not require that *all* cases must be treated alike; treating dissimilar cases alike can be as productive of inequality as treating similar cases differently.² The principle 'requires that *similar* situations shall not be treated differently'.³ The extent of the similarity which must exist before the principle can apply cannot be stated with precision. To require *total* similarity would mean that the rule could never apply; each individual is unique, and no two individuals can ever be wholly similar to one another.⁴ It would be equally absurd to go to the other extreme and to dilute the requirement of similarity to vanishing point (e.g. by arguing that all individuals are alike in that they are all members of the human race, and that they must all therefore pay the same amount of tax, regardless of their means). Clearly the right answer lies somewhere in the middle between these two extremes, but its exact location may often be uncertain. Moreover, similarities which are relevant for one rule may be irrelevant for another; to exempt one-legged men from paying all taxes would infringe the principle of equality, but to exempt them from military service would not—one-legged men are similar to two-legged men as regards their ability to pay tax, but not as regards their ability to perform military service.

The *Royal Scholten-Honig* case was concerned with subsidies for and levies on the production of goods. In *this* context, according to the Court, goods are similar (and must normally be treated alike) if they compete⁵ with one another, i.e. if they can be

¹ It should be noted that this part of the Court's judgment was based on Article 40 (3), not on the general principle of equality. The judgment in the *Ruckdeschel* case, which dealt with a different regulation and found that there had been 'a disregard of the principle of equality', appears to be based on the general principle of equality rather than Article 40 (3).

² *Italy v. Commission*, [1963] E.C.R. 165, 178.

³ [1978] E.C.R. 2037, 2072 (italics added). The Court qualified this by adding 'unless the differentiation is objectively justified'. For an example of a situation in which different treatment of similar products was objectively justified, see *Hoffman's Stärkefabriken A.G. v. Hauptzollamt Bielefeld*, [1977] E.C.R. 1375, 1395-7.

⁴ Cf. *Barbara Erzbergbau A.G. v. High Authority*, [1960] E.C.R. 173, 191.

⁵ Different products which are not *usually* in competition with one another (i.e. which are substituted for one another only in exceptional circumstances) do not need to be treated alike: *Milac v. Hauptzollamt Freiburg*, [1978] E.C.R. 1721, 1734-5.

used as substitutes for one another.¹ This seems a reasonably precise criterion of similarity. Moreover, statements and conduct by the body enacting the regulation in dispute can be invoked against that body as evidence of similarity. In the *Royal Scholten-Honig* case, the preamble to the regulation imposing the production levy on isoglucose recited that isoglucose was 'a substitute product in direct competition with sugar', and the Court quoted this recital to support its finding that isoglucose and sugar were similar and should therefore be treated alike. In the *Ruckdeschel* case, a regulation, enacted in 1967, recited in its preamble that quellmehl was interchangeable with certain other products and granted production refunds for quellmehl and the other products; that regulation remained in force until 1974, when the production refund for quellmehl was abolished, although the production refund for the other products was maintained. The Court held, in effect, that, because of the wording of the preamble of the 1967 regulation and the length of time during which the regulation had remained in force, there was a presumption that quellmehl and the other products remained interchangeable and should be treated alike, and that the Council had failed to discharge the onus of rebutting that presumption.²

Tortious liability for invalid regulations

*Case No. 3. Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. v. Council and Commission.*³ The Court's ruling in the *Royal Scholten-Honig* case that 'the provisions of Regulation No. 1111/77 establishing the production levy system for isoglucose offend against the general principle of equality of which the prohibition on discrimination set out in Article 40 (3) of the Treaty is a specific expression' made it unnecessary for the Court to consider the other grounds pleaded by the plaintiffs for challenging the validity of Regulation No. 1111/77, such as breach of Article 39 (1) of the Treaty, *détournement de pouvoir*, and violation of the principle of proportionality. But these and other grounds for challenging the validity of regulations can often coincide and overlap with breach of 'the general principle of equality of which . . . Article 40 (3) is a specific expression'. This is illustrated by *Bela-Mühle Josef Bergmann K.G. v. Grows-Farm G.m.b.H.*, where the defendants challenged the validity of Regulation No. 563/76, which, in order to reduce the Community's surplus of dairy produce, made it obligatory for purchasers of animal feeding-stuffs to buy skimmed-milk powder at a high price. The defendants argued that this regulation violated Articles 39 (1) and 40 (3) and the principle of proportionality. The Court said:

Because of the close connexion between these grounds of complaint, it will be appropriate to consider them together . . .

The arrangements made by Regulation No. 563/76 constituted a temporary measure intended to counteract the consequences of a chronic imbalance in the common organization of the market in milk and milk products. A feature of these arrangements was the imposition not only on producers of milk and milk products but also, and more especially, on producers in other agricultural sectors of a financial burden which took the form, first, of the compulsory purchase of certain quantities of an animal feed product and, secondly, of the fixing of a purchase price for that product at a level three times higher than that of the substances which it replaced. The obligation to purchase at such a *disproportionate*

¹ The Court said: 'It must be ascertained whether isoglucose is in a situation comparable to that of other products of the starch industry, in particular in the sense that they can be substituted for isoglucose . . .'. Does the use of the words 'in particular' imply that this is one of the several possible criteria of similarity? If so, what are the other criteria?

² [1977] E.C.R. 1753, 1756, 1770-1.

³ [1978] E.C.R. 1209.

price constituted a *discriminatory* distribution of the burden of costs between the various agricultural sectors. Nor, moreover, was such an obligation necessary in order to attain the objective in view, namely, the disposal of stocks of skimmed-milk powder. It could not therefore be justified for the purposes of attaining the objectives of the common agricultural policy [which are laid down in Article 39 (1) of the E.E.C. Treaty].

The Court therefore held that Regulation No. 563/76 was invalid for violation of Articles 39 (1) and 40 (3) and the principle of proportionality.¹

In *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. v. Council and Commission*, the plaintiffs, who were breeders of poultry, claimed damages for the expense which they had incurred by being required to buy skimmed-milk powder at a high price as a result of Regulation No. 563/76. The Court referred to its previous ruling that Regulation No. 563/76 was invalid, and said:

The finding that a legislative measure such as the regulation in question is null and void is however insufficient by itself for the Community to incur non-contractual liability for damage caused to individuals under the second paragraph of Article 215 of the E.E.C. Treaty.² The Court of Justice has consistently stated that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

In the present case there is no doubt that the prohibition on discrimination laid down in the second sub-paragraph of the third paragraph of Article 40 of the Treaty and infringed by Regulation No. 563/76 is in fact designed for the protection of the individual,³ and that it is impossible to disregard the importance of this prohibition in the system of the Treaty.⁴ To determine what conditions must be present in addition to such breach for the Community to incur liability in accordance with the criterion laid down in the case-law of the Court of Justice it is necessary to take into consideration the principles in the legal systems of the member States governing the liability of public authorities for damages caused to individuals by legislative measures. Although these principles vary considerably from one member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. This restrictive view is explained by the consideration that the legislative authority, even

¹ [1977] E.C.R. 1211, 1220-1 (italics added). On the principle of proportionality, see the opinion of Mr Advocate General Capotorti, *ibid.*, pp. 1232-4; this *Year Book*, 45 (1971), pp. 434-5; Ganshof van der Meersch, *Recueil des cours*, 148 (1975), pp. 1, 158-9; Schermers, *Judicial Protection in the European Communities* (1976), pp. 49-50; *Buitoni S.A. v. Fonds d'orientation et de régularisation des marchés agricoles*, [1979] E.C.R. 677.

The principle of proportionality has been borrowed by the Court from the laws of member States. It is particularly well developed in German law, but traces of the same approach can be found in other member States, such as France (*Recueil Dalloz Sirey: Jurisprudence* (1972), pp. 194, 195, 198) and England, where, according to *Kruse v. Johnson*, [1898] 2 Q.B. 91, 99-100, bye-laws made by local authorities would probably be held void for unreasonableness if 'they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men' (on the appropriateness of treating E.E.C. regulations in the same way as local authority bye-laws for the purposes of determining the scope of judicial review, see this *Year Book*, 48 (1976-7), pp. 401-3).

² The second paragraph of Article 215 provides: 'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

³ The principle of proportionality is also clearly designed for the protection of the individual, but it is uncertain whether the same is true of Article 39 (1) of the Treaty: see the opinion of Mr Advocate General Capotorti, [1978] E.C.R. 1230-1.

⁴ See below, p. 281 n. 1.

where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals.

It follows from these considerations that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void. In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

This is not so in the case of a measure of economic policy such as that in the present case, in view of its special features. In this connexion it is necessary to observe first that this measure affected very wide categories of traders, in other words all buyers of compound feeding-stuffs containing protein, so that its effects on individual undertakings were considerably lessened. Moreover, the effects of the regulation on the price of feeding-stuffs as a factor in the production costs of those buyers were only limited since that price rose by little more than 2%. This price increase was particularly small in comparison with the price increases resulting, during the period of application of the regulation, from the variations in the world market prices of feeding-stuffs containing protein, which were three or four times higher than the increase resulting from the obligation to purchase skimmed-milk powder introduced by the regulation. The effects of the regulation on the profit-earning capacity of the undertakings did not ultimately exceed the bounds of the economic risks inherent in the activities of the agricultural sectors concerned.

In these circumstances the fact that the regulation is null and void is insufficient for the Community to incur liability under the second paragraph of Article 215 of the Treaty. The application must therefore be dismissed as unfounded.

The Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. All three requirements must be satisfied; the rule broken by the enactment of the regulation must be a superior rule (which presumably means that it must be superior to the regulation in the hierarchy of the sources of Community law),¹ it must be designed for the protection of the individual (thus excluding, for example, rules about voting procedure in the Council, which are designed to protect member States, not individuals), and the breach of the rule must be sufficiently serious. Although the prohibition on discrimination laid down in Article 40 (3) was a superior rule of law for the protection of the individual, the plaintiffs failed because the breach of that rule was not 'sufficiently serious'. It seems that the seriousness of the breach is to be defined by reference to the seriousness of the plaintiff's loss, and not by reference to the degree of blame to be attributed

¹ Mr Advocate General Capotorti adopted an even more restrictive approach, arguing that the rule must be not only superior to the regulation in the hierarchy of the sources of Community law, but *also* 'a rule which is of fundamental importance in the Community legal order': [1978] E.C.R. 1232. This approach may be reflected in the Court's judgment, which emphasized the importance of Article 40 (3), instead of merely pointing out that Treaty provisions were automatically superior to regulations. But it is submitted that the introduction of a distinction between important superior rules and unimportant superior rules is too restrictive and creates unnecessary vagueness and uncertainty.

to the institution which enacted the offending regulation.¹ In cases like the present one, where losses are spread over a large number of businesses, the loss suffered by any one business is likely to be small; in such cases, the rule that no action lies for small losses is desirable, because it prevents the Court from being inundated by a large number of small claims.

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¹ See the opinion of Mr Advocate General Capotorti, [1978] E.C.R. 1231-7. But the Court's statement that liability is confined to cases where 'the institution concerned has manifestly and gravely disregarded the limits on . . . its powers' *could* be interpreted to mean that the degree of blame to be attributed to the institution must also be taken into account, in addition to the seriousness of the plaintiff's loss.

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² Based on the *Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law* adopted by the Committee of Ministers of the Council of Europe in Resolution (68) 17 of 28 June 1968.

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Abbreviations

H.C. Debs.	House of Commons Debates
H.L. Debs.	House of Lords Debates
Cmnd.	Command Paper

Part One : II. A. *International law in general—relationship between international law and municipal law—in general*

(See also Part Four: V. and VII., and Part Six: I. C. (written answer of 23 February 1979), *infra*.)

At the 147th meeting in the sixth session of the Human Rights Committee of the International Covenant on Civil and Political Rights, held in New York on 25 April 1979, the United Kingdom representative, Mr. Cairncross, stated:

. . . when the United Kingdom signed a treaty, the Government examined it carefully before it was ratified in order to ascertain whether the legislation in force was in keeping with the provisions of the treaty. In the United Kingdom, the provisions of treaties were generally not incorporated into domestic legislation. (CCPR/C/SR. 147, p. 8.)

At the 164th meeting in the seventh session of the Human Rights Committee of the International Covenant on Civil and Political Rights, held in Geneva on 7 August 1979, the United Kingdom representative, Sir Michael Hogan, stated:

Mr. Lallah had raised the question of putting the fundamental rights with which the Covenant was concerned into something in the nature of an Order in Council, to give them greater status in the United Kingdom's dependent Territories. He had also, like other members of the Committee, raised the question of the status of the Covenant in the Territories. Before adhering to the Covenant, the United Kingdom Government had satisfied itself that the laws in force in the Territories concerned were consonant with the provisions of the Covenant. (CCPR/C/SR. 164, p. 6.)

Later at the same meeting, the United Kingdom representative, Mr. Watts, stated:

The United Kingdom . . . did what it could to ensure that local legislation in the dependent Territories conformed to the provisions of the Covenant. (Ibid., p. 12.)

Part One : II. B. *International law in general—relationship between international law and municipal law—international law in municipal courts*

(See Part Four: VII., *infra*.)

Part One : II. C. *International law in general—relationship between international law and municipal law—municipal remedies for violations of international law*

(See Part Four: VII. and Part Thirteen: II. A., *infra*.)

Part Two : I. *Sources of international law—treaties*

In the course of a debate, the Lord President of the Council and Leader of the House of Commons, Mr. Michael Foot, stated:

The terms 'treaty' and 'international agreement' are general in character and include instruments which may bear any one of a considerable number of different titles. I say

this because there is sometimes confusion about it. Others include protocol, exchange of notes, convention or accord. The title of a particular treaty has no bearing on its legal effect. All it does is to indicate the general nature of the treaty. (*Hansard*, H.C. Debs., vol. 964, col. 1066: 16 March 1979.)

Part Two : X. *Sources of international law—acquisition and loss of rights*

Her Majesty's Government was asked the following question:

Whether in their view rights in international law which are not exercised lapse; and if so, after what period of not being exercised they may be held to have lapsed.

In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

There is no doubt that in certain circumstances rights under international law may be deemed to have been waived or abandoned or to have otherwise lapsed, but each case would have to be examined closely in the light of its particular facts. (*Hansard*, H.L. Debs., vol. 398, col. 960: 8 February 1979.)

Part Three : I. A. 1. *Subjects of international law—States—international status—sovereignty and independence*

In reply to the question what discussions have taken place with the Government of Canada on a new British North America Act and what procedures would be followed in this Parliament on a request for patriation of the Canadian constitution, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No discussions have taken place with the Canadian Government on this matter. The British North America Acts, which contain the constitution of Canada, can be amended in certain important respects only by Act of the United Kingdom Parliament. The Canadian Prime Minister has expressed publicly his intention of working with the Provincial Governments of Canada towards an agreed package of constitutional changes which could lead to a request that this power of amendment should be a matter of Canadian competence and should no longer be exercisable by the United Kingdom Parliament. If a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the United Kingdom Government to introduce in Parliament, and for Parliament to enact, appropriate legislation in compliance with the request. (*Hansard*, H.C. Debs., vol. 971, Written Answers, col. 500: 27 July 1979.)

In the course of a debate in the House of Lords on the subject of the visit to London of the National Indian Brotherhood of Canada, the Government spokesman, Lord Trefgarne, stated in part:

I believe that what I have said shows that the Indian delegation were received by the United Kingdom Government in the best possible manner in the circumstances. Even if, however, they had been received at a more exalted level, the fact of the matter is that it could have made no difference. The United Kingdom Government are simply in no constitutional position to intervene in matters of this sort. The central point is that although the Indians rightly look to the Queen as their Sovereign in any matter affecting them, it is the Canadian Government and not the Government of the United

Kingdom which must advise the Queen. The position is, however, rather more complicated than that, and perhaps this is a good moment for me to elaborate.

Canada is an independent sovereign nation within the Commonwealth. Executive power is vested in the Queen acting through the Governor-General and on the advice of Her Canadian Ministers. The Canadian constitution is principally contained in the British North America Act of 1867, as subsequently amended. This Act established a federal system of Government in Canada and set out the powers of the Federal Parliament and the Provincial legislatures. While each Province was given jurisdiction to amend its own constitution, the British North America Act, the constitution of the Federation, can in certain important respects be amended only by Act of the United Kingdom Parliament. Over the years since 1867, the constitution has been amended 14 times by the United Kingdom Parliament. On each occasion this has been at the request of the Canadians. No Act of the United Kingdom Parliament affecting Canada has been passed unless Canada had requested and consented to its enactment. Indeed, Section 4 of the Statute of Westminster of 1931 provides that no law made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion. This reflects the agreements reached at the Imperial Conference of 1930. Although no clearly-defined procedure for amendment was laid down in the British North America Act, the practice has grown up over the years that Canadian requests for amendment are submitted by means of a formal Address to the Crown from both Canadian Houses of Parliament.

The former Canadian Prime Minister expressed publicly the desire of the Canadians that the power of amendment of the constitution should be a matter of Canadian competence and should no longer be exercisable by the United Kingdom Parliament—that is, that the constitution should be ‘patriated’ to Canada.

In a series of Federal-Provincial conferences, the Canadians have sought to reach agreement on an amending formula which would become part of the law of Canada and transfer to the Canadian Parliament exclusive power to amend the British North America Act. So far the Provinces have failed to reach unanimous agreement with the Federal Government. But this is, of course, a matter for the Canadians themselves to resolve.

The United Kingdom Government’s position is that if a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the Government to introduce in Parliament, and for Parliament to enact, appropriate legislation in compliance with the request. No such request has yet been received, and with the change of Government in Canada it seems unlikely that such a request will appear in the very near future. The new Prime Minister of Canada, Mr. Clark, has however said that he proposes to continue to work towards constitutional change, but he has emphasised that he was not working to any particular time-scale.

As I understand it, the National Indian Brotherhood is anxious to play a fuller part in the consideration of constitutional revision between the Federal and Provincial authorities. This is a matter for the Canadians themselves, and is not a matter in which the United Kingdom Government can intervene, or would wish to do so. As a result of Canada’s full and sovereign independence, attained if not in 1867 with the British North America Act, then as a result of the Statute of Westminster of 1931, any residual powers or duties of the United Kingdom passed to the Canadian Government. The Statute of Westminster reserves to the United Kingdom Parliament a purely technical role in relation to the British North America Act.

I must, therefore, emphasise again to the House that the United Kingdom Parliament's power over the Canadian Constitution is strictly limited. If Parliament were, in spite of constitutional precedent, to decline to act on a request from the Canadian Government, we would lay ourselves open to charges of interference in Canadian domestic politics. Even to query whether there was internal support in Canada for a request to patriate the constitution would be tantamount to questioning the authority of the Canadian Parliament or Government to make it. Further, for the United Kingdom Parliament to purport to legislate otherwise than at the request and with the consent of the Canadian Government would conflict with the agreements reached with the Dominions at the Imperial Conference of 1930 and the Statute of Westminster of 1931, to which I have already referred. The Federal Government is the sole representative of Canada in international relations. We cannot be the arbiters of the correct balance of the case presented to us; this must be the sole responsibility of the Canadian Government. (*Hansard*, H.L. Debs., vol. 401, cols. 2003-5: 25 July 1979.)

Part Three : I. A. 2. *Subjects of international law—States—international status—non-intervention*

(See Part Thirteen: I. D., *infra*.)

Part Three : I. B. 1. *Subjects of international law—recognition—recognition of States*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government's position remains to recognise de facto the incorporation of the Baltic States into the Soviet Union but to withhold full recognition. (*Hansard*, H.C. Debs., vol. 970, Written Answers, col. 461: 17 July 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

In accordance with the provisions of the Helsinki final act the Soviet Government notified the military manoeuvre 'NEMAN', which will be held in Lithuania from 23-27 July. Under a further voluntary provision, the Soviet Government invited the United Kingdom and others to send observers. The United Kingdom has accepted, in common with a number of other Western countries and in accordance with our wish to take full advantage of the final act. This has no implications for our position on the recognition of the incorporation of the Baltic States into the Soviet Union in 1940: we recognise this incorporation de facto but withhold full recognition. (*Hansard*, H.C. Debs., vol. 970, Written Answers, cols. 849-50: 20 July 1979.)

Part Three : I. B. 2. *Subjects of international law—recognition—recognition of governments*

In the course of a debate in the House of Lords on the subject of the United Kingdom's relationship with Taiwan, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

... Her Majesty's Government acknowledge the position of the Chinese Government

that Taiwan is a Province of the People's Republic of China. (*Hansard*, H.L. Debs., vol. 398, col. 1093: 13 February 1979.)

On 13 February 1979 the Foreign and Commonwealth Office released the following press statement:

The British Ambassador in Tehran has been instructed to make contact today with the new government of Dr. Bazargan and to say that we look forward to establishing good relations with the new administration on the basis of friendship and mutual respect. This constitutes our act of recognition of the new government in Iran, which now fulfils our normal criteria for recognition. (Text provided by the Foreign and Commonwealth Office.)

In the course of a written reply, the Minister of State, Foreign and Commonwealth Office, wrote:

We have recognised the new Iranian government of Dr. Bazargan. (*Hansard*, H.C. Debs., vol. 962, Written Answers, col. 543: 14 February 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The new Government of Grenada fulfil our normal criteria for recognition. (*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 144: 27 March 1979.)

In reply to an oral question, the Minister of State, Foreign and Commonwealth Office, Mr. Hurd, stated:

The last Government extended recognition to the new Iranian Government in mid-February. We are not proposing to reconsider this decision. (*Hansard*, H.C. Debs., vol. 968, col. 411: 13 June 1979.)

In the course of answering a question on the subject of the new administration in Ghana, the Lord Privy Seal, Sir Ian Gilmour, stated:

We have watched developments in Ghana over the past two weeks closely. Once we were satisfied that our criteria for recognition had been met, recognition was accorded the new Administration.

... Ghana and Rhodesia are not comparable, because Rhodesia is not an independent State. Ghana is an independent State and, following a change of Administration, the normal criteria for recognition apply. In Rhodesia the question is one not of recognition but of restoring legality.

... Our criteria for recognition have placed us in considerable difficulties. However, the alternatives also have disadvantages. I am told that virtually all Governments since 1950 have looked at the matter and have not altered the criteria. I assure my hon. Friend that we shall re-examine the matter. (*Hansard*, H.C. Debs., vol. 968, cols. 917-20: 18 June 1979.)

In reply to a question, the Lord Privy Seal wrote:

The criteria which have been applied by successive Governments are as stated in the answer given by the Minister of State for Foreign and Commonwealth Affairs to a question on 27 February 1967, namely:

"The general practice which Her Majesty's Government have followed in relation to sovereign States in Africa, as elsewhere, is to recognise *de jure* a Government, estab-

lished by revolutionary action, when Her Majesty's Government considers that the new Government enjoys, with a reasonable prospect of permanence, the obedience of the mass of the population and the effective control of much the greater part of the territory of the State concerned. Her Majesty's Government must, of course, take due account of special circumstances relating to any specific instance, including any United Nations or other international action.' [Vol. 742, c. 7.]

Recognition enables Her Majesty's Government fully to conduct business with the government in question. By it, Her Majesty's Government accept that the Government are entitled to represent the State concerned in its international relations and that their acts may be regarded as binding on it in international law. (*Hansard*, H.C. Debs., vol. 969, Written Answers, cols. 152-3: 26 June 1979.)

In the course of a debate in the House of Lords on the subject of Rhodesia, the Government spokesman in the House of Lords, Lord Trefgarne, stated:

In relation to a new Government of a legally independent country there is only one question to answer—do we recognise that new Government? The answer to that question is decided by reference to certain accepted criteria which relate to the support commanded by the new Government, and to its prospects of permanence.

However, in relation to Rhodesia, the question is not one of recognition, but first of granting legal independence to a dependent territory. This raises complex issues, and these we are now working to resolve. But it is my duty to warn your Lordships in the plainest possible terms that the risks attached to premature recognition of the new Government in Salisbury are very serious indeed. (*Hansard*, H.L. Debs., vol. 401, col. 865: 10 July 1979.)

In reply to the question whether Her Majesty's Government would agree to recognize the Government in Rhodesia, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated:

... in the case of Rhodesia, the question is not one of recognition but of the granting of legal independence to a country for which Britain has a constitutional responsibility. Our intention is to bring Rhodesia to independence with the widest possible international acceptance. (*Hansard*, H.L. Debs., vol. 401, col. 1501: 19 July 1979.)

In the course of the same debate, the Secretary of State went on to say:

... as I said in the original Answer, there is a difference between recognising a Government and giving independence. There are certain criteria for recognising Governments which, though they are in some degree applicable to giving independence to a country, are not always wholly the same. (*Ibid.*, col. 1502.)

In the course of a debate in the House of Lords on the subject of the United Kingdom's policy towards Cyprus, the Government spokesman, Lord Trefgarne, stated:

... the formal position, in accordance with our obligations under the 1960 Treaties, is that Britain recognises only one Government in Cyprus—that of the Republic of Cyprus under President Kyprianou. There can be no question, in the present situation in Cyprus, of recognition of any other Administration. (*Hansard*, H.L. Debs., vol. 401, col. 2024: 25 July 1979.)

In reply to the question whether Her Majesty's Government proposed to

recognize the government of national reconstruction in Nicaragua, the Minister of State, Ministry of Agriculture, Fisheries and Food, Earl Ferrers, stated:

... we are still considering this question.

... the situation in Nicaragua has been a very complicated one. We have not had our own representatives there; we have sent a representative there who has made a report and we are considering that. (*Hansard*, H.L. Debs., vol. 401, col. 2158: 27 July 1979.)

In the course of a debate in the House of Commons on the subject of aid to Cambodia, the Minister of State, Foreign and Commonwealth Office, Mr. Blaker, made the following remarks about the recognition of the government in Cambodia;

I repeat that the issue of which regime in Cambodia the Government recognise has had nothing to do with the Government's decisions on aid, which have been taken solely on humanitarian grounds. Britain still recognises the Pol Pot regime. It was recognised by the previous British Administration. I cannot understand why some seem to be enthusiastic about the Heng Samrin regime. Heng Samrin was a political commissar and a divisional commander under Pol Pot and his regime. However, that is not the issue. My information is that in the areas controlled by the Heng Samrin regime the aid is reaching its destination. That is the important matter.

... The issue is not recognition of one regime or another, but aid. However, the Heng Samrin regime came into Phnom Penh on the back of the Vietnamese Army. If the Vietnamese Army were withdrawn, it may be that it would collapse. The Pol Pot regime is still recognised by many non-aligned countries, including all the ASEAN countries, so we are not alone.

... The Government made it clear that recognition does not imply approval.

... The policy that the Government are pursuing on recognition is identical with that pursued by the previous Administration, which recognised the Pol Pot regime. The control of territory in Cambodia in May was exactly the same, or more or less the same, as it is now.

... The right hon. Gentleman should know the principles that successive Governments have followed for many years on recognition. We are following those principles precisely. (*Hansard*, H.C. Debs., vol. 972, cols. 31-4: 22 October 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Recognition does not imply approval of a regime's actions or policies. The previous Government, who cited the enormity of Pol Pot's human rights violations before the United Nations Human Rights Commission in March 1978, continued to recognise that regime. Despite the loss of control of the greater part of the territory of Cambodia by the Pol Pot regime, there is no other Government which satisfies the criteria for recognition which have been applied by successive British Governments. (*Hansard*, H.C. Debs., vol. 972, Written Answers, col. 268: 25 October 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We are still examining all aspects of our relations with Chile. The level of diplomatic representation is only one of these. We already recognise the Government of

Chile. (*Hansard*, H.C. Debs., vol. 975, Written Answers, col. 712: 13 December 1979.)

Part Three: I. B. 3. *Subjects of international law—States—recognition—forms of recognition*

(See Part Three: I. B. I., *supra*.)

Part Three: I. B. 5. *Subjects of international law—States—recognition—non-recognition*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote that Her Majesty's Government had no intention of recognizing the administration set up by South Africa in Namibia (*Hansard*, H.C. Debs., vol. 968, Written Answers, col. 236: 13 June 1979).

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have no relations with East Timor, which is not a separate State. (*Hansard*, H.C. Debs., vol. 971, Written Answers, col. 62: 23 July 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government do not recognise a Government of East Timor. (*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 214: 5 December 1979.)

In the course of a debate on the subject of Cambodia, the Lord Privy Seal, Sir Ian Gilmour, stated:

When we came to power last May, Pol Pot's Government held a dwindling proportion of the territory in Cambodia. Since September that proportion has further dwindled though of course Pol Pot's forces continue to resist. As the House is aware, our normal criteria require us to accord recognition to a Government who enjoy, with a reasonable prospect of permanence, the obedience of the mass of the population and the effective control of much the greater part of the country. The House will have noted statements by my hon. Friend the Minister of State on 22 October, and on 1 November by my right hon. Friend the Prime Minister, who emphasised our wish to explain fully to other governments of the area our view of the situation as it has developed and as I have given it to the House this evening. This we have done.

It will therefore come as no surprise to the House if I say that we can no longer regard Pol Pot as leading an effective Government in Cambodia. By the same token, however, the dependence of the so-called Heng Samrin regime on the Vietnamese occupation army is complete; there is no reason to doubt that without the presence of the occupation troops it would be swept away by resurgent Cambodian nationalism. I therefore make it very clear that we emphatically do not recognise any claim by Heng Samrin. Our position is that there is no Government in Cambodia whom we can recognise. This position is shared by the United States and by some of our leading friends in Europe. (*Hansard*, H.C. Debs., vol. 975, col. 723: 6 December 1979.)

Later in the same debate, the Minister of State, Foreign and Commonwealth Office, Mr. N. Ridley, stated:

I shall begin by trying to answer two of the questions put by the right hon. Member for Lanark (Dame Judith Hart). She asked about the position of other EEC countries on the question of recognition. About half of them are in the same position as we are now. Others still recognise the Pol Pot regime. The United States had adopted the same position as we have.

The right hon. Lady also asked about the implications of not recognising either regime. We are unable to recognise the Heng Samrin regime for the very simple reason that it does not accord with our criteria for doing so. Over the years successive British Governments have adopted criteria involving taking a view about the likely permanence of the command over the loyalties of the people which the regime in question possesses. It is our view that it is not right to assume that the loyalty, if any, that the Heng Samrin regime may command from the Cambodian people is likely to be permanent. (Ibid., col. 756.)

In the same debate, Mr. P. Blaker, Minister of State, Foreign and Commonwealth Office, stated:

I have already explained why we cannot and will not recognise the Heng Samrin regime. It was brought in by the Vietnamese army. Anybody who has lived for two years in Cambodia, as I have, will know that one of the strongest feelings of the Cambodian people is fear—hatred would not be too strong a word—of the Vietnamese. The so-called ruler who was brought in on the back of the Vietnamese army could not survive when the support of the Vietnamese army was removed.

Our position on the question of credentials in the United Nations is a separate issue. There have been occasions when the United Kingdom Government have supported the credentials of delegations representing States or Governments which the United Kingdom did not recognise. We have made clear that acceptance of credentials is not an act of recognition. This is also the practice of other countries. Several countries which do not recognise the Pol Pot regime voted in favour of the acceptance of his delegation's credentials at the current General Assembly. Among them was the Federal Republic of Germany and the United States of America. (Ibid., col. 760.)

In reply to a question, the Lord Privy Seal wrote:

Official recognition is extended only to Governments. We have not accepted the Palestine Liberation Organisation's claim to be the sole legitimate representative of the Palestinians, but we are aware of the importance of their views in determining Palestinian attitudes. (*Hansard*, H.C. Debs., vol. 975, Written Answers, col. 560: 11 December 1979.)

Part Three: I. C. 4. *Subjects of international law—States—types of States—dependent States*

(See also Part Three: I. D. 2., II. A. 3. and III. E., *infra*.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

... under the Treaty of Friendship and Co-operation signed in Brunei on 7th January, the Government will relinquish responsibility for Brunei's external affairs and our

consultative commitment for Brunei's defence. The Treaty will come into effect on the 31st December, 1983. The text will shortly be laid before Parliament. (*Hansard*, H.L. Debs., vol. 398, cols. 690-1: 7 February 1979.)

In reply to the question what agreement had been reached, in the light of the United States' claim to sovereignty over the Phoenix and Northern Line Islands, at present part of the Gilberts, to transfer these islands to the United States before the granting of Gilbertese independence, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No such agreement is contemplated. We propose that the Gilbert Islands should become independent with its territory as at present constituted. (*Hansard*, H.C. Debs. vol. 962, Written Answers, cols. 179-80: 21 February 1979.)

During the Second Reading debate on the Kiribati Bill in the House of Lords, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

The intention of the Bill is that Kiribati should become independent as its territory is at present constituted. It comprises 33 islands in all, including the Line Islands and the Phoenix Islands. The total area is 264 square miles, scattered across 2,000,000 square miles of the Pacific Ocean around the point at which the International Date Line cuts the Equator. The capital of the territory is Tarawa. The people are Micronesian, and the total population is about 56,000, the bulk of whom live in the Gilberts Group.

Britain's first official involvement in the islands was in 1877, when the Western Pacific High Commission was established in an endeavour to protect the islands in the region from being raided by blackbirders for labour to work in plantations in South America, Fiji, Hawaii, Tahiti and Queensland. In 1888-89, Christmas, Fanning and Washington, in the Northern Line Islands, were annexed by Britain. A British Protectorate was declared in 1892 over the Gilberts Group and the neighbouring Ellice Islands, which are now Tuvalu. Banaba (Ocean Island) was annexed in 1900. The Gilbert and Ellice Islands Colony succeeded the Protectorate in 1916, and was extended to include Banaba, Fanning and Washington Islands. Christmas Island was included in 1919, the Phoenix Islands in 1937 and the Central and Southern Line Islands in 1972. (*Hansard*, H.L. Debs., vol. 398, col. 1594: 19 February 1979.)

At the 147th meeting in the sixth session of the Human Rights Committee of the International Covenant on Civil and Political Rights, held in New York on 25 April 1979, the United Kingdom representative, Mr. Richard, stated with regard to the Channel Islands and the Isle of Man:

Those islands were not part of the United Kingdom, but dependencies of the Crown. The three islands were governed by lieutenant-governors appointed by the Crown and had their own legislatures, whose laws were subject to the approval of the Sovereign, and their own courts of justice. The Islands were responsible for their own domestic affairs; and the acts of the United Kingdom Parliament were not applied to them unless they contained express provisions or necessary implication to that effect. The United Kingdom Government was responsible for the external defence and foreign relations of the Islands, and consulted with their authorities concerning any international agreement which directly affected them. Although the Islands took just pride in their

independent status, which the United Kingdom was careful to respect, they shared the social and cultural background of the United Kingdom and maintained close contact with it through the Home Office. (CCPR/C/SR. 147, p. 2.)

In the course of the second reading debate in the House of Commons on the Kiribati Bill, re-introduced after the change of Government, the Lord Privy Seal, Sir Ian Gilmour, referred to the discussions on the future status of the island of Banaba at the Gilbert Islands Constitutional Conference which took place between 21 November and 7 December 1978. He stated:

The first part of the conference was devoted exclusively to consideration of the future status of Banaba. Regrettably, no agreement could be reached. The Banabans would settle for nothing less than Banaba's separation from the Gilbert Islands before independence. The Gilbertese opposed separation but were willing to consider any arrangement short of separation. After a week of exhaustive discussion, the chairman of the conference, the right hon. Lord Goronwy-Roberts, announced the Government's decision that Banaba should remain part of the Gilbert Islands. This decision, the text of which is in paragraph 3 of the conference report, was based on normal British policy, and the generally accepted United Nations principle on questions of self-determination of respecting the wishes of the people as a whole within the existing boundaries of the territory to become independent. (*Hansard*, H.C. Debs., vol. 967, col. 1248: 24 May 1979.)

Later in the same debate, the Minister of State, Foreign and Commonwealth Office, Mr. Blaker, stated:

Discussions between the Gilbert Islands Government, the United States Government and ourselves have been successfully concluded, with the initialling of a draft treaty under which, when it is ratified, the United States Government will renounce all their claims to sovereignty over the disputed islands, which are in the Phoenix and the Line Islands groups. It is planned by the two parties, the United States Government and the Kiribati Government, that the treaty will be signed on or shortly after independence day. (*Hansard*, H.C. Debs., vol. 967, col. 1331: 24 May 1979.)

Explaining why the island of Banaba had been included in the territory to be given independence under the name of Kiribati, Mr. Blaker stated:

Our main reasons were, first, as has been much mentioned in the debate, that it has been the practice of successive British Governments when granting independence to dependent territories to respect existing colonial boundaries and the wishes of the people of the territory as a whole. As the hon. Member for Merthyr Tydfil said, that is also the principle of the United Nations. He referred to Resolution 1514 of December 1960 concerning independence for colonial countries and peoples. That resolution declared that the partial or total disruption of the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

Hon. Members have cited many examples that they claim are exceptions to these principles. In the past dependent territories have been hived off, but I am unaware of any case in which separation has been pushed through in defiance of the wishes and without the consent of the elected government of that territory. (*Ibid.*, col. 1333.)

In moving the approval of the draft St. Vincent Termination of Association

Order 1979, the Government spokesman in the House of Lords, Lord Trefgarne, stated:

The order will be made under Section 10(2) of the West Indies Act (1967). The West Indies Act requires that any Order made under this Section must be laid in draft before Parliament and approved by resolution of both Houses. The effect of the order is to terminate the status of association between the United Kingdom and Saint Vincent. It is proposed that it should come into effect on 27th October 1979. Saint Vincent will then be a fully independent sovereign State.

The link between the United Kingdom and Saint Vincent dates back to 1627 when Saint Vincent was included in a patent given by Charles I to the Earl of Carlisle. During the remainder of the 17th century, and most of the 18th, ownership of the island was the subject of dispute between the British and the French. After the French declared war on Britain during the American War of Independence, Saint Vincent fell into French hands but was restored to Britain by the Treaty of Versailles in 1783. Saint Vincent remained, for most of the time as part of the Windward Islands, a British colony until 1969 when it became one of the six West Indies Associated States. This status gave Saint Vincent full internal self-government while Britain retained responsibility for external affairs and defence. Associated statehood, intended as an interim stage on the path to full independence, has generally worked well. During the past few years there has been a general desire on the part of the States involved to complete the move to independence and three of the six have done so: Grenada in 1974 was followed by Dominica in November, 1978, and Saint Lucia in February of this year.

Section 10(1) of the West Indies Act 1967 provides for Associated States to terminate the status of association themselves, by resolution at the House of Assembly endorsed by a two-thirds majority in a popular referendum. Each State has, however preferred to use the procedure under Section 10(2) of the Act, whereby the British Government grants independence by Order-in-Council. This is also Saint Vincent's request. The House will recall that the British Government have sought in previous cases to satisfy themselves on two main counts before deciding to proceed by Order-in-Council: first, that the people of the State in question wish to become independent and, secondly, that a satisfactory constitution has been drawn up which safeguards fundamental rights and freedoms. We believe that both criteria have been met for Saint Vincent and that we should therefore accede to their request. (*Hansard*, H.L. Debs., vol. 401, cols. 692-3: 9 July 1979; see also H.C. Debs., vol. 969, col. 1693: 5 July 1979.)

At the 164th meeting in the seventh session of the Human Rights Committee of the International Covenant on Civil and Political Rights, held in Geneva on 7 August 1979, the United Kingdom representative, Mr. Stratton, stated:

It should be remembered that since the adoption of General Assembly resolution 1514 (XV) in 1960, it was self-determination that had been at issue, not independence if only because there could well prove to be certain Territories, for example St. Helena, which might never be able to achieve independent status on their own. (CCPR/C/SR. 164, p. 2.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Although exploratory discussions with the Antiguan authorities on the termination of association have been going on for some time, no formal request for this has yet been made. The British Government are ready to consider any proposals. (*Hansard*, H.C. Debs., vol. 972, Written Answers, col. 267: 25 October 1979.)

In the course of a debate in the House of Commons on the Zimbabwe Bill, the Lord Privy Seal, Sir Ian Gilmour, stated:

Clause 1 of the Bill provides for the establishment of the independent Republic of Zimbabwe—this being the name agreed between all the parties at the constitutional conference. It follows that on independence the Parliament and Government of the United Kingdom will no longer have responsibility for Southern Rhodesia and the clause so provides. The remaining provisions of the Southern Rhodesia Act 1965, which deal with Britain's jurisdiction over Rhodesia, will cease to have effect.

The date of Rhodesia's independence will be fixed by Order in Council, which will be laid before Parliament after being made. It is not feasible to set a precise date now as would be normal in an independence Bill. We shall look to the Governor to make a recommendation in due course after consulting the parties. But, as the House will be aware, it was agreed at the conference that independence would follow elections, and the Governor's main task will be to make arrangements for these. Once elections have been held, the Governor will take the steps necessary under the constitution to appoint a Prime Minister and set in train the arrangements for the election of a President. Independence will follow. (*Hansard*, H.C. Debs., vol. 975, col. 1330: 12 December 1979.)

In reply to a question about constitutional development in St. Kitts-Nevis-Anguilla, the Minister of State, Foreign and Commonwealth Office, wrote:

Talks under my chairmanship were held in London on 13 and 14 December with a delegation from the St. Kitts-Nevis Government and with representatives from Nevis. It was agreed that the St. Kitts-Nevis Government would take steps in the States Legislature to facilitate the formal separation by Her Majesty's Government of Anguilla from the Associated State. It was decided that St. Kitts-Nevis should move to independence as a unitary State as early as possible in 1980 but that a referendum should be held 18 months after independence to decide whether Nevis should remain part of the State. The St. Kitts-Nevis Government agreed, in the meantime, to pursue further measures of devolution. (*Hansard*, H.C. Debs., vol. 976, Written Answers, col. 321: 20 December 1979.)

Part Three: I. D. 1. *Subjects of international law—States—formation, continuity and succession of States—formation*

(See Part Three: I. C. 4., *supra*, and Part Three: III. E., *infra*.)

Part Three: I. D. 2. *Subjects of international law—formation, continuity and succession of States—identity, continuity and succession*

(See also Part Three: I. C. 4., *supra*.)

During the second reading debate on the Kiribati Bill in the House of Lords, the question was asked whether, in the context of United States claims to the Phoenix and Line Island groups, any rights or claims which may lie with the

present Government would pass to Kiribati if no satisfactory arrangement had been concluded between the United Kingdom and the United States by the date of independence. After stating that Her Majesty's Government regarded all thirty-three of these islands as forming the territory upon which it was hoped to confer independence and sovereignty, the Minister of State, Lord Goronwy-Roberts, stated:

... it is our intention that sovereign independence should be conferred upon what used to be known as the Gilbert Islands (namely Kiribati) and that the territory comprises the 33 islands which in turn includes the islands and all the sovereignty and rights that attach thereto. That is the British view. Our American friends understand this. We are discussing with them, on that basis, what the future should hold. (*Hansard*, H.L. Debs., vol. 398, col. 1636: 19 February 1979.)

In reply to a question relating to the payment of pensions to Rhodesian public servants, the Minister of State, Foreign and Commonwealth Office, wrote:

A number of Members of Parliament and others have passed to me a circular letter they have received from Mr Lennox, president of the Public Services Association enclosing a leaflet entitled 'The Payment of Pensions of Rhodesian Civil Servants after Independence'. I have replied in detail to the points raised in this leaflet, explaining the British Government's consistently held view that Rhodesian public servants' pensions must be the responsibility of an independent Government of Zimbabwe. (*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 144: 27 March 1979.)

In a communication to the Secretary-General of the United Nations dated 19 December 1978 the Government of Tuvalu made the following declaration concerning the succession by Tuvalu to treaties extended or applied to its territory by the United Kingdom before the attainment of independence on 1 October 1978:

... 2. The Government of Tuvalu, conscious of the desirability of maintaining existing international legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of the Gilbert and Ellice Islands Protectorate, the Gilbert and Ellice Islands Colony and Tuvalu were succeeded to by Tuvalu upon independence by virtue of customary international law. Since, however, it is likely that by virtue of that law certain of such treaties may be said to have lapsed at the date of Tuvalu's independence, it seems essential that each treaty purporting or deemed to bind Tuvalu before that date should be subjected to legal examination. The Government of Tuvalu proposes after such examination has been completed to indicate which, if any, of the treaties which may be said to have lapsed by virtue of customary international law it proposes to treat as having lapsed.

3. The Government of Tuvalu desires that it should be presumed that each treaty purporting or deemed to bind Tuvalu before independence has been legally succeeded to by Tuvalu and that action should be based on such presumption unless and until the Government of Tuvalu decides that any particular treaty should be treated as having lapsed. Should the Government of Tuvalu be of the opinion that it has legally

succeeded to any treaty, and wish to terminate the operation of such treaty, it will in due course give notice of termination in the terms thereof.

4. For the avoidance of doubt, the Government of Tuvalu further declares that it does not regard itself as bound by the terms of any convention creating an international organisation to the extent that such convention requires the payment of any sum by any State, by virtue only of the accession of the Government of the United Kingdom to such convention.

In a communication to the Secretary-General of the United Nations dated 28 February 1979 the Government of the United Kingdom referred to the declaration regarding treaty succession made by the Government of Tuvalu on 19 December 1978 (see above) and stated:

The Government of the United Kingdom hereby declare that, upon Tuvalu becoming an independent sovereign state on 1 October 1978, the Government of the United Kingdom ceased to have the obligations or rights they formerly had, as the authority responsible for the administration of Tuvalu, by virtue of any international instrument applying to Tuvalu. (*United Kingdom Treaty Series*, No. 53 (1979) (Cmnd. 7624), pp. 38-9.)

The Permanent Representative of the United Kingdom to the United Nations, Sir Anthony Parsons, addressed the following communication, dated 6 November 1979, to the Secretary-General of the United Nations:

I have the honour, by direction of Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, to refer to the letter dated 11 September 1979 addressed to Your Excellency by the Beretitenti of Kiribati setting out his Government's position in relation to the succession by Kiribati (the former Gilbert Islands) to treaty rights and obligations of the Government of the United Kingdom in respect of the Gilbert Islands.

The Government of the United Kingdom hereby declare that, upon the Gilbert Islands becoming the independent sovereign state of Kiribati on the 12th of July 1979, the Government of the United Kingdom ceased to have the obligations or rights they formerly had, as the authority responsible for the administration of the Gilbert Islands, by virtue of any international instrument applying to the Gilbert Islands. (Text provided by the Foreign and Commonwealth Office.)

In the course of a debate on 21 November 1979 in the Sixth Committee of the United Nations General Assembly on the Report of the International Law Commission, the United Kingdom representative, Mr. J. Freeland, referred to two draft articles on State archives formulated by the Commission in the context of the succession of States in respect of matters other than treaties. Mr. Freeland observed:

We welcome much of what appears from these two draft articles and from the commentary on them to be the approach of the Commission on this question: that is, the Commission's recognition that, whether or not archives are a type of state property, they are a very special case because they may be indispensable to both successor and predecessor states and cannot by their nature be divided or split up, but can be duplicated; and that close cooperation among states is of great importance for the settlement of disputes about archives through negotiation carried out in good faith. As

Professor Šahović pointed out to us, and as the commentary also makes clear, the Commission wished to draw the attention of governments particularly to draft Article A and to invite their comments on the definition which it contains. In response, I am glad to be able to say that my delegation finds that definition acceptable. I must add, however, that we have difficulties with the terms of draft Article B, stemming in particular from the words 'having belonged to the territory' in its paragraph (1) (a), read in conjunction with what is said in paragraph (5) of the commentary, on page 216 of the English version of the report. We do not think it appropriate to treat the archives of such institutions as local missionary bodies or banks as 'having belonged to the territory' within the meaning of this draft article. We therefore believe that there is a need for further consideration to be given to the precise nature of the relationship between the territory and the archives in question which should form the pre-condition for the operation of the relevant part of that draft article. As regards the contents of paragraph (1) (b) of draft Article B, which we find acceptable in principle, I think it worth my pointing out that the normal practice of the United Kingdom has been to ensure that administrative archives are handed over to the newly independent state. More than that, the United Kingdom Government have taken steps to establish local archives in dependent territories before the attainment of independence and have in many cases provided technical assistance in the post-independence period to make available qualified archivists and to improve the arrangement, housing and accessibility of local archive collections. In sum, Mr Chairman, we consider that, subject to drafting improvements to cover the point to which I have referred on paragraph (1) (a) of Article B and to avoid excessive rigidity in that Article more generally, the contents of draft Articles A and B should be sufficient, for practical purposes, to dispose of this part of the topic; and we accordingly question the need for any further provisions on the subject to be added. (Text provided by the Foreign and Commonwealth Office.)

[For the terms of the draft articles referred to above, see *Report of the International Law Commission on the work of its 31st Session, General Assembly, Official Records, 34th Session, Supplement No. 10 (A/34/10)*, pp. 210–27.]

Part Three : II. A. 1. (b). *Subjects of international law—international organizations—in general—legal status—powers, including treaty-making power*

In the course of a debate on 21 November 1979 in the Sixth Committee of the United Nations General Assembly on the Report of the International Law Commission, the United Kingdom representative, Mr. J. Freeland, referred to the Commission's work on the topic of treaties concluded between States and international organizations or between two or more international organizations. He observed:

... the Commission made significant progress in adding to the draft articles adopted by it at previous sessions. As regards those earlier draft articles, I shall comment only on draft Article 36 *bis*. We spoke in some detail on that draft article in last year's debate in the Sixth Committee, making it clear that we were firmly convinced—as we remain—of the need for the inclusion of some provision on those lines, although we considered that the actual formulation of the draft article could no doubt be improved. We note that in the draft article as reproduced on page 396 of the English version of this year's report there has been a change, in that the word 'acknowledges' has replaced the word 'acknowledged' in sub-paragraph (b). It may be that this change is no more than a

copying mistake, if only because the use of the verb in the singular cannot be right in the context. If, however, there was indeed an intention to change the verb from the past to the present tense, this would further increase the unsatisfactory nature of the drafting by creating considerable ambiguity as to the point in time at which the acknowledgement must be made in order to be effective. We are therefore strengthened in the view that the actual drafting of the article needs to be looked at again, in the light of the comments made by my delegation and others last year about the importance of having a clear statement of the principle which it embodies. We continue to regard the inclusion of a rule of this general nature as both necessary and entirely justified by developments in state practice.

As regards the new draft articles on this topic, we welcome the Commission's decision, in relation to draft Article 45 in particular, that no artificial difference should be created in the rules applicable to states and international organizations respectively, on the basis of 'limited international capacity' of the latter. Limits on international capacity, whatever they may be, relate principally to the area of treaty-making competence. (Text provided by Foreign and Commonwealth Office.)

[For the terms of the draft articles referred to above, see *Report of the International Law Commission on the work of its 31st Session, General Assembly, Official Records*, 34th Session, Supplement No. 10 (A/34/10), pp. 396, 400-1.]

Part Three: II. A. 1. (c). *Subjects of international law—international organizations—in general—legal status—privileges and immunities*

In moving the approval of the draft INMARSAT (Immunities and Privileges) Order 1979, the Minister of State, Lord Goronwy-Roberts, stated in part:

I beg to move that the INMARSAT (Immunities and Privileges) Order 1979 be approved. This order, which will be made under the International Organisations Act 1968, was laid before the House on 29th March. The reason why I am moving this order today is one of urgency. It is of considerable importance that the United Kingdom should be able to ratify the INMARSAT Convention on or before the next meeting of the INMARSAT Preparatory Committee, which is to take place from 14th to 18th May. At that meeting it is expected that a sufficient number of States—that is, those representing 95 per cent. of the total initial investment shares in the organisation—will have become parties to the Convention. This will enable it, in accordance with Article 33, to enter into force 60 days later.

The INMARSAT Convention was drawn up at an inter-Governmental conference held in London in 1975 to consider the establishment of a world-wide maritime satellite system under international control. At the final session of the conference a convention and operating agreement establishing the International Maritime Satellite Organisation (for which 'INMARSAT' is, I hope, an acceptable acronym), and setting out the details of its operation, were opened for signature. The United Kingdom signed the convention, subject to ratification, on 3rd September 1976. The Post Office, as the entity designated by the Government to participate, signed the operating agreement on 30th March 1979.

Your Lordships will wish to be aware that the purpose of INMARSAT is to procure and operate the so-called space segment; that is to say, the satellite system which will provide, in conjunction with national earth stations, the particular service or services necessary for: first, developing communications to improve distress and safety of life at sea communications; second, increasing the efficiency and better management of

ships; third, maritime public correspondence services; and, fourth, accurate ship position fixing by radio. There can be no doubt that it is in the interests of the United Kingdom, as a major maritime nation, to participate in an international organisation designed to meet the need for more efficient communications at sea. Because of frequency limitations and other technical constraints, it is becoming progressively more difficult to maintain an adequate system of ship-to-shore communications. The disastrous accidents involving super-tankers which have occurred in recent years illustrate only too well the need to improve existing communications facilities. The use of satellites to develop a system of safe and efficient maritime communications and to improve navigational aids should go a long way towards reducing the risk of similar disasters in the future.

My Lords, it has been decided that, at the invitation of Her Majesty's Government, INMARSAT will establish its headquarters in the United Kingdom. Thus, when the convention comes into force, it is proposed that the Government shall enter into a headquarters agreement with the organisation in order to define the privileges and immunities which will be required to enable it to exercise its functions here. A further Order in Council will need to be made to implement the provisions of that headquarters agreement, and the House will, at that time, have the opportunity to give full consideration to what is then proposed.

The draft order now before your Lordships is required to give effect to Article 25 and Article 26, paragraph (1), of the INMARSAT Convention, thereby enabling the United Kingdom to ratify the convention. These articles require that the organisation shall have legal personality, and that it shall be exempt from direct taxes and from Customs duties on communication satellites and components, and parts for them, to be launched for use in the INMARSAT space segment. (*Hansard*, H.L. Debs., vol. 399, cols. 1943-4: 4 April 1979.)

In moving the approval of the draft INTELSAT (Immunities and Privileges) Order 1979, the Government spokesman in the House of Lords, Lord Trefgarne, stated:

The first of these orders relates to the International Telecommunications Satellite Organisation and will revoke the order made in 1972 in respect of this organisation. It is required to give effect to the Protocol on INTELSAT Privileges, Exemptions and Immunities which was signed by the United Kingdom on 23rd August 1978 and laid before the House on 2nd November 1978.

The United Kingdom has been associated with the development of satellite communications since the first experimental launchings of such a satellite in 1962. We were one of the founder members of the consortium which was set up in 1964 as an interim measure pending the conclusion in 1971 of an agreement establishing the International Telecommunication Satellite Organisation 'Intelsat'. One hundred and two States have now signed this agreement, which the United Kingdom ratified on 16th February 1972.

The purpose of INTELSAT is to continue the design, development, operation and maintenance of the satellites and associated systems which provide, on a commercial basis, a reliable, high quality international public telecommunications service to all areas of the world. The two essential elements in this service are, first, the space segment, which at the moment comprises 13 satellites in geo-stationary orbit at various locations over the Atlantic, Indian and Pacific Oceans at a height of some 22,240 miles; and, secondly, the ground segment, consisting of 160 earth stations located in 100

countries. The combined system of satellites and earth stations provides approximately 685 earth station-to-earth station communication channels.

Your Lordships may be interested to know that the Protocol on INTELSAT Privileges, Exemptions and Immunities is the first multilateral non-regional agreement on privileges and immunities to be concluded for some time. It was agreed upon at a conference held in May 1978 in Washington, where the organisation has its headquarters. The general trend of the conference was towards a limitation of the privileges and immunities to be accorded to INTELSAT, and persons connected with it, because of the semi-commercial nature of the organisation.

Accordingly, the order provides a more limited range of privileges and immunities than is customary for most international organisations of which the United Kingdom is a Member State. Thus, INTELSAT is to be exempted from taxation and from Customs duties, not on all of the items it imports or purchases for its official use, but only in respect of 'the exempted items'; that is, communications satellites and components and parts for them, which are to be put into orbit or carry out the organisation's main function. This means that, in respect of Customs and taxation exemptions, the draft order now before your Lordships is giving no more, and I would like to stress this, than is already being given to the organisation by the existing order which is now being revoked.

As regards the staff members of the organisation, the Protocol requires that they shall enjoy immunity from jurisdiction in respect of their official acts and, in member countries of which they are not nationals or permanent residents, exemption from income tax on their salaries and emoluments from INTELSAT. When taking up an appointment in another member country they are also to be granted exemption from Customs duties and taxes on the importation of their personal effects. These are the basic privileges and immunities which the United Kingdom has recognised as necessary and appropriate for the staff members of international organisations. The order accordingly gives effect to those provisions, but your Lordships will appreciate that we are unlikely to have to implement them in this country, since there is no proposal that INTELSAT should set up an office here.

The Protocol also requires that representatives of the contracting parties shall be granted immunity from suit only in respect of their official functions. A similar provision extends to the members of an arbitration tribunal which may be established under the provisions of the INTELSAT agreement or operating agreement to settle disputes arising between the organisation and contracting parties or between parties or signatories themselves. Thus, if such a tribunal were to be set up in this country, the arbitrators and witnesses participating in the arbitration proceedings would be accorded immunity, but again only in respect of their official functions. I should like to emphasise however, that for these persons, as also for the officials of the organisation, immunity does not extend to motor traffic offences or accidents. From what I have said, your Lordships will realise that the making of this order will not result in any significant extension of immunity from the jurisdiction of our courts; nor will its effect on the Exchequer be more than minimal. (*Hansard*, H.L. Debs., vol. 401, cols. 1232-5: 16 July 1979.)

Lord Trefgarne then moved the approval of the draft Oslo and Paris Commissions (Immunities and Privileges) Order 1979. He stated:

This is required to give effect to the agreement relating to the commissions established by the Convention for the Prevention of Marine Pollution by Dumping from

Ships and Aircraft 1972, and the *Convention for the Prevention of Marine Pollution from Land-Based Sources 1974*.

The Agreement was laid before the House on 10th May 1979. Happily, rather than use the full and very lengthy title of the agreement, the order refers to the shorter titles by which these two separate, but related, commissions are generally known.

The Oslo Convention has as its object the protection of the marine environment from dumping by ships and aircraft. The convention which now has 12 parties, resulted from a meeting of some North Sea States, convened in 1971 on the initiative of the United Kingdom. The convention came into force on 7th April 1974. It requires all dumping in the North Sea and North-East Atlantic (but excluding the Baltic and Mediterranean) by ships and aircraft to be authorised by national authorities. It prohibits the dumping of certain substances such as compounds of heavy metals, organochlorines, and carcinogenic substances, and others which might find their way into the food chain. Specific permits are required for the dumping of other, less harmful, substances, and the convention has provisions regarding the characteristics of the waste, packing methods, and the location of the dumping site.

The Paris Convention, which concerns the prevention of marine pollution from land-based sources including rivers and estuaries, arose from a French initiative in 1973. It was welcomed as a much needed supplement to the Oslo Convention, covering, as it did, the same geographical area, and was closely modelled on that earlier convention. It came into force on 6th May 1978, and eight of the 14 signatories have so far ratified it. Parties to the Paris Convention undertake as a matter of urgency to eliminate pollution of the sea, from land-based sources by certain defined substances, to limit strictly pollution by other substances, to monitor marine pollution, and to co-operate in research.

Each of the conventions established a commission, composed of representatives from each contracting party, to oversee its operations. The Oslo Commission based its secretariat in London where it could maintain close liaison with the Inter-Governmental Maritime Consultative Organisation, which is the secretariat body for the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. With the entry into force of the Paris Convention it was agreed between the two commissions that their affairs could be most economically handled by a single secretariat. Thus the joint secretariat came into being in London to act on behalf of both the Oslo and Paris Commissions.

The draft order confers legal personality on the commissions and exempts them from the payment of direct taxes. Unlike most orders of this kind, it does not confer any privileges or immunities upon representatives of Member States, since none were requested. The five staff-members are to receive only such privileges and immunities as are necessary for this small joint secretariat to function effectively here. I hope that your Lordships will approve the draft order, thus confirming your support for the valuable work which is being carried out by the Oslo and Paris Commissions. (*Ibid.*, cols. 1235–6.)

Lord Trefgarne then moved the approval of the draft *International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979*. He stated: This order relates to the international fund set up to deal with the payment of compensation as a result of pollution damage caused by the escape or discharge of oil from ships.

The 'Torrey Canyon' incident in 1967 demonstrated that there did not exist in international law adequate provision to enable those affected by marine oil pollution damage to recover the considerable cost of carrying out preventative measures, and in

effecting cleaning-up operations. The United Kingdom Government therefore took the initiative in measures which led to an inter-governmental conference negotiating in 1969 the International Convention on Civil Liabilities for Oil Pollution Damage. This convention, which entered into force in 1975, has now been accepted by 39 countries, including almost every significant maritime power. The major exception is the United States. While being a great step forward in making shipowners strictly liable for oil pollution damage caused by laden tankers the limit of their liability at £9.5 million was still inadequate to cover a major disaster.

Accordingly, a further inter-governmental conference adopted in December 1971 the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. This fund is financed by levies on imported oil which are paid by the oil companies of contracting States. The oil companies have no control over the disposal of monies from the fund. It makes compensation available to victims of oil pollution, when adequate compensation could not be obtained under the earlier convention from the shipowners concerned. Your Lordships will recognise that these provisions follow the 'polluter pays' principle. The owner of a laden tanker that spills oil is liable to meet a first tranche of compensation under the Civil Liability Convention, with a second tranche being financed by the oil industry. The United Kingdom ratified the fund convention in 1976 and made an order to give effect to its provisions on privileges and immunities. The convention entered into force on 16th October 1978, and compensation from it is now obtainable up to a maximum of £29.3 million sterling per incident. The original maximum was £19.5 million sterling, but this amount was increased in April this year.

The presence in London of the Inter-Governmental Maritime Consultative Organisation with which the fund requires to work in close collaboration, was one of the incentives which led the fund's members to accept Her Majesty's Government's invitation to establish its headquarters in London. When IMCO move in two or three years' time into the new building which is being constructed for them on the Albert Embankment, the fund will have its own offices in that building. At present it is housed in separate premises which IMCO have leased close to their existing headquarters. We have negotiated an agreement with the fund setting out the conditions under which its small staff will operate here. This agreement was laid before the House on 21st June. A new order is required to give effect to that agreement. It incorporates the fiscal reliefs provided by the earlier order which it revokes, and accords the additional privileges and immunities which are specified in the agreement.

The scale of these privileges and immunities is comparable with that accorded to most of the other international organisations having their headquarters in London. However, a significant difference is that the fund's immunity from suit is more limited in certain respects. For example, action may be taken against the fund in the courts of this country in relation to the compensation provisions of the convention. I am sure that your Lordships will also recognise the additional benefits which will accrue to this country from the receipt of the levies paid to the fund by the oil companies. (Ibid., cols. 1236-8.)

Part Three : II. A. 2. (b). *Subjects of international law—international organizations—in general—participation of States in international organizations—suspension, withdrawal and expulsion*

The following declaration was made at the signing of the Final Act of the

1979 Congress of the Universal Postal Union in Rio de Janeiro on 26 October 1979:

1. The Nine Member States of the European Community condemn South Africa's racial policy and are making determined and constructive efforts to improve the situation.

2. However, the decision taken on 13 September 1979 purporting to expel a member country from the UPU was taken in breach of the UPU Constitution which contains no provision for the expulsion of members. The decision, therefore, has no legal validity and accordingly the Nine do not accept it. They consider that South Africa is still a member of the Universal Postal Union and will, therefore, continue to treat with the South African Postal Administration.

3. Furthermore, they hold the decision of Congress contrary to the principle of universality of the United Nations and deplore actions of a purely political nature in organisations such as the UPU which are dedicated to technical, economic and humanitarian ends. They believe that such action, by breaching the constitution of the UPU and by detracting from the universality of the Union, will be damaging to the organisation itself, which depends on international cooperation and respect for its constitutional rules. (Text provided by the Foreign and Commonwealth Office.)

Part Three : II. A. 3. *Subjects of international law—international organizations—in general—legal effects of acts of international organizations*

In reply to the question what categories of European Community legislation, and what other resolutions or instruments of any other international body, are binding on Her Majesty's Government, and in which cases they require the approval of Parliament, the Lord Privy Seal wrote:

Under article 189 of the treaty establishing the EEC (Cmnd. 7460), regulations made by the EEC Council and Commission are binding on the United Kingdom, as are directives or decisions addressed to the United Kingdom: similar provisions apply under the ECSC and Euratom treaties. Proposals for Council legislation are subject to Parliamentary scrutiny . . .

Leaving aside the powers of the Security Council to decide upon measures under articles 39 and 41 of the United Nations Charter to maintain or restore international peace and security, no other international body is empowered to adopt resolutions or instruments binding on Her Majesty's Government, save in relation to matters concerning the internal functioning of the particular international body. Where it is necessary to give effect to any binding resolutions or instruments of an international body in the law of the United Kingdom, the appropriate measures are brought before Parliament. (*Hansard*, H.C. Debs., vol. 974, Written Answers, cols. 13-14: 19 November 1979.)

Part Three : II. B. 3. *Subjects of international law—international organizations—particular types of organizations—organizations constituting integrated communities*

In reply to the question whether British exchange control was in conformity with the Treaty of Rome, the Solicitor-General for Scotland wrote:

To the extent that our present exchange control restrictions do not conform with the

EEC Directives on capital movements, we are authorised to maintain them by the Commission's Decision of 22nd December, 1977, under Article 108(3) of the EEC Treaty. (*Hansard*, H.L. Debs., vol. 399, col. 1977: 4 April 1979.)

In reply to the question what steps were to be taken to ensure that the Assembly of the E.E.C. was correctly described, the Prime Minister wrote:

None.

The term 'Assembly' appears in the Treaties and is legally correct: but the institution has described itself since 1962 as the European Parliament and this term is generally in use throughout the Community. The Government accept the common usage, which does not affect the nature of the institution; we shall continue to use the term 'Assembly' in legal Acts or where it is necessary to distinguish that institution from Parliament at Westminster. (*Hansard*, H.C. Debs., vol. 971, Written Answers, col. 1: 23 July 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Kiribati has submitted a request for accession to the Lomé Convention, and its application is now being processed. Meanwhile steps have been taken to ensure that the provisions and benefits of the overseas countries and territories decision of 29 June 1976, which have till now applied to the Gilbert Islands, will continue to apply to Kiribati until it has acceded to the Lomé Convention. The Government have given its agreement to these measures before completion of the parliamentary scrutiny procedures in order to avoid the damage to Kiribati's interests which would have been caused by delaying the matter until after the Summer Recess. (*Hansard*, H.C. Debs., vol. 971, Written Answers, col. 498: 27 July 1979.)

The following questions on the subject of Article 20 of the Statute of the Court of Justice of the European Communities were put to Her Majesty's Government. The written replies were provided by the Government spokesman in the House of Lords.

Q: Whether it is the responsibility of any one department of Government to ensure that statements or written observations are submitted by the United Kingdom to the European Court under Article 20 of the Statute of the Court of Justice of the EEC; and, if not, whether they intend to create such a special responsibility for any department.

A: The Foreign and Commonwealth Office is responsible for ensuring that the Court's documentation reaches the Government Department responsible for the subject matter of the cases before the Court. Thereafter, the responsibility for the decision to submit observations and for their preparation rests with that department which is assisted in the legal processes by the Treasury Solicitor.

Q: On how many occasions between 1st January 1973 and 31st December 1978 a statement or a written observation has been submitted to the European Court by the United Kingdom, in cases to which it was not a party, under the provisions of Article 20 of the Statute of the Court of Justice of the EEC; and what were the general categories of subject matter of those cases.

A: The United Kingdom submitted observations in 36 such cases. The cases embraced questions on state controls and aids, use of trade marks, customs law, movement of persons, agriculture and fisheries, health matters and social security.

Q: What plans they have to improve the processes by which statements or observations made by the United Kingdom under Article 20 of the Statute of the Court of Justice of the EEC can be presented within the time limit of two months specified by that article.

A: We have no plans to change our own arrangements for submitting observations in cases before the Court. A Council working group is examining papers submitted by the European Court of Justice and the United Kingdom which identify areas in which the Court's procedures could be improved. We have suggested that there should be more flexibility in the application of the time limits for the submission of observations under Article 20 of the Protocol of the Statute of the Court of Justice of the European Economic Community and the related provisions of the other Community Treaties.

Q: In how many cases decided by the European Court since 1st January 1973 the United Kingdom was prevented from making observations or written statements which it desired to make by reason of the expiry of the time limit in article 20 of the Statute of the Court of Justice of the EEC.

A: There have been no occasions when the United Kingdom has been prevented by the expiry of the time limits from putting in observations actually under preparation. However, the time limits have on occasion been too short and inflexible to prepare observations as thoroughly as we would have wished. This factor has also influenced decisions on whether or not to submit observations. Her Majesty's Government are seeking the agreement of other Member States to an extension of these limits when an appropriate opportunity for amendment of Treaties arises.

Q: How many judgments of the European Court of Justice, delivered since 1st January 1973, without the benefit of observations or a written statement by the United Kingdom, under Article 20 of the Statute of the Court, in cases to which the United Kingdom was not a party, they now regard as having substantial effects upon the laws administered in our courts; and into what general categories of subject matter those judgments fall.

A: It is not possible to quantify cases which fall into this category. The Government's policy is to submit observations in cases in which we judge that United Kingdom interests are at stake or in which the outcome is likely to affect Community law or national law applied in our courts in a way which we consider inappropriate or disadvantageous.

Q: In how many cases decided by the European Court since 1st January 1973, to which the United Kingdom was not a party and in which it made no statement or observation under Article 20 of the Statute of the Court of Justice, they now consider that the absence of such statement or observation would have affected the judgment of the Court in a way which would have been beneficial to the laws administered in our courts; and what plans they have to increase the number of such statements or observations in such cases in the future.

A: It is impossible to say what account the Court of Justice of the European Communities would have taken of observations which were not in fact submitted. Our

practice is whenever possible to submit statements and observations in all appropriate cases. (*Hansard*, H.L. Debs., vol. 401, cols. 213-16: 2 July 1979.)

In moving the approval of the draft European Communities (Definition of Treaties) (ECSC Decision of 9th April 1979 on Supplementary Revenues) Order 1979, the Government spokesman in the House of Lords, Viscount Long, stated:

. . . I beg to move that the draft European Communities (Definition of Treaties) (ECSC Decision of 9th April 1979 on Supplementary Revenues) Order 1979, laid before the House on 5th July 1979, be approved. The order specifies as a Community Treaty the decision taken at the Council of Ministers on 9th April 1979 to allocate supplementary revenues to the 1979 budget of the European Coal and Steel Community.

If the House approves this order, it will formally define the decision of the Council of Ministers as a Community Treaty. I should like briefly to set out the legal basis for the procedure which we are undertaking, although I believe that some noble Lords will be familiar with it. The order will define the decision of the council as a Community Treaty under Section 1 of the European Communities Act 1972. This was the enabling Act passed when this country joined the European Communities. Approval of the draft order will allow the Government to make the necessary payment to the ECSC under the powers conferred by Section 2(3) of the same Act. (*Hansard*, H.L. Debs., vol. 401, col. 1590: 19 July 1979.)

In the course of replying on behalf of the Government to a debate in the House of Lords on the subject of the benefits of E.E.C. membership to Gibraltar, Lord Trefgarne stated in part:

Let me begin by reminding noble Lords of the formal status which we secured for Gibraltar—I might add after lengthy negotiation—in the Accession negotiations between 1970 and 1972.

What we wanted for Gibraltar was that the Treaty should apply, but that certain provisions of it which would have been either irrelevant or unnecessarily and excessively complicated, should not. This was achieved in the following way. Article 227.4 of the Treaty of Rome declares that 'the provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible'. But special provisions in the Treaty of Accession provide that three major areas of Community business do not apply within Gibraltar: the Common Commercial Policy (thus enabling Gibraltar, which has a very narrow tax base, to continue to control and retain revenue raised from import duties); the Common Agricultural Policy (because Gibraltar has no agriculture); and the obligation to introduce a value added tax. I need not go into details of the legal mechanics by which these derogations are given force of law. The effect of the arrangements I have described is, of course, that Gibraltar has not been required to make any budgetary contribution to the Community budget, nor have Her Majesty's Government done so on Gibraltar's behalf.

It may be useful if I review briefly the other main areas of the Treaty as they apply to Gibraltar. All the other rules of the Community apply in Gibraltar and Gibraltar is part of the territory of the Community. Community regulations are given direct force of law by means of Gibraltar's European Communities ordinance; and the Gibraltar authorities have taken steps to implement all Community secondary legislation where relevant locally.

Gibraltarians are United Kingdom nationals for European Community purposes. Gibraltar therefore has had the opportunity to benefit from the provisions of the Treaty covering freedom of movement of persons, services and capital. Among other things, this means that any Gibraltarian wanting to establish himself professionally in any of the other member-States has the general right to do so. Furthermore there are now a number of specific areas—doctors, dentists, nurses, in some respects lawyers, and so on—where there is Community-wide recognition of qualifications. This too provides potential benefit to Gibraltar. But it will be for the Gibraltar Government itself to monitor the extent to which Gibraltarians have taken advantage of these arrangements.

I now come to the three major sources of Community aid, apart from the CAP, to members of the Community. I refer to the Regional Development Fund, the Social Fund, and loans from the European Investment Bank. These were the points raised specially by my noble friend Lord Selsdon. In principle, both the provisions of the Treaty concerning the bank and the acts establishing the funds apply to Gibraltar. There has been careful analysis by the Government over the years of the possibility of securing aid for Gibraltar from these sources. No doubt these analyses—as they are now—took place under the previous Administration.

As far as the EIB is concerned the bank has confirmed to the Government of Gibraltar that there is no legal obstacle to EIB lending to Gibraltar. Applications from Gibraltar for EIB loans would however naturally have to fit one of the three separate criteria set out in Article 130 of the Treaty of Rome. These are: projects for developing less developed regions; projects for modernising undertakings or developing fresh activities called for by the progressive establishment of the Common Market; and projects of common interest to several member-States.

A condition for both the last two is that they are of such a size or nature that they cannot be entirely financed by the means available in the individual member-States. It has not so far been possible to identify a project acceptable to the bank in the light of these criteria. There are, however, a number of projects still under discussion between the Gibraltar authorities and the appropriate departments in London, although I can give no undertaking as to what the outcome will be. One of the Bank's requirements is that it must have appropriate security for any loans it makes. The Government are currently examining whether it would be possible to provide the necessary guarantee if a suitable project was identified.

One possibility in the longer term is of a project that would meet the so-called 'common interest' criterion. With Spain a member of the Community it is possible to think of a number of projects of common interest to both Gibraltar and Spain that might conceivably qualify for EIB assistance. Although the Regional Development Fund in principle applies to Gibraltar, Article 3 of the regulation establishing the fund provides that regions and areas which may benefit from the fund shall be limited to those aided regions established by member-States in applying their systems of regional aid. Investments may benefit from the fund's assistance only if they fall within the framework of a national regional development programme. Gibraltar has never hitherto been included in areas to which the Government apply their system of regional aid; nor have the Government ever adopted a regional development programme covering Gibraltar. My noble friend Lord Selsdon specifically asked me whether Gibraltar could become an assisted area. I am told there may be some difficulties in doing that, but it is a matter I should like to look into further and perhaps I may write to my noble friend about it.

I am afraid there are similar problems with respect to the European Social Fund. Again, we would of course be willing to consider any projects which the Gibraltar Government might wish to put forward in relation to the Social Fund. They have not so far done so. This is not surprising, given, as the noble Lord, Lord Goronwy-Roberts, said, that Gibraltar has full employment or virtually so. This Government remain constitutionally responsible for Gibraltar's external relations. This includes representing Gibraltar's interests in the Council of Ministers and taking Gibraltar's interests into account in all relevant matters discussed within the Community context.

Gibraltar's relationship with the European Parliament has been a matter for discussion in this House in the context of direct elections to the European Parliament. Your Lordships will recall that the Government decided that it would be inappropriate for Gibraltar to participate in the direct elections to the European Parliament, given that the territory was not represented at Westminster. No overseas territory of any member State which does not participate in the national elections is represented in the directly elected European Parliament. Accordingly, Annex 2 of the Act annexed to the Council Decision of 1976 providing for direct elections to the European Parliament stated that the United Kingdom will apply the provisions of this Act only in respect of the United Kingdom. This provision was not directed specifically to Gibraltar: it operates to exclude the Channel Islands and the Isle of Man also.

The provisions of the Treaty relating to the European Court of Justice also apply to Gibraltar. This means that in principle a matter coming before the legal authorities in Gibraltar could be referred to the European Court for a preliminary ruling under Article 177. In practice this has not yet happened. (*Hansard*, H.L. Debs., vol. 401, cols. 1909-12: 24 July 1979.)

In reply to a question, the Lord Chancellor, Lord Hailsham, stated:

... where a fishing vessel of a Member State of the EEC is accused of contravening fisheries legislation in force within British fishing limits, subsequent court proceedings will take place in United Kingdom courts. The case cannot be transferred to the European Court, which has no criminal jurisdiction; but if the case raises a question of Community law and a decision on that question is necessary to enable the United Kingdom court to give judgment, it may (and in the case of a tribunal from which no further appeal is possible, it must) refer that question to the European Court for a preliminary ruling. The proceedings in the United Kingdom court will then be stayed until the ruling of the European Court has been obtained.

... The Government of the offending vessel's country plays no part in the proceedings before the United Kingdom court and cannot influence its decision to refer a question of Community law to the European Court. If however such a question is referred, the Government of any Member State may submit written observations to the European Court and may appear in the oral proceedings before that court.

... If a question of Community law occurs during the hearing of a case, whether civil or criminal, before a United Kingdom court, the United Kingdom court may refer that question of Community law for a Community court ruling. It is not bound to do so; it is a matter of discretion, unless the court is one from which no further appeal is possible. In that case, European law compels the reference to be made. (*Hansard*, H.L. Debs., vol. 403, cols. 329-30: 27 November 1979.)

In reply to the question whether the unilateral banning of the import of sperm oil would be a breach of the Treaty of Rome or of any other international

agreement to which the United Kingdom is a party, the Government spokesman in the House of Lords wrote:

The only international agreement to which the United Kingdom is a party that is relevant to the question is the Treaty of Rome. Although the following opinion has not been tested in the courts, it is our understanding that for trade within the Community the United Kingdom would be entitled to ban unilaterally the import of sperm whale oil on conservation grounds relying for the purpose on Article 36 of the treaty.

We do not believe that Article 36 can be applied in the case of trade between Member States of the Community and other countries. It appears that the United Kingdom would not technically be entitled to act unilaterally under or in consequence of the treaty to effect a ban without there first being a derogation from the Council of Ministers under Article 3(1) of Regulation 1562/78. (*Hansard*, H.L. Debs., vol. 403, col. 1355: 12 December 1979.)

Part Three : II. B. 4. *Subjects of international law—international organizations—particular types of organizations—other types of organizations—Central Commission for the Navigation of the Rhine*

In reply to a series of questions, the Minister of Transport wrote in respect of the British Commissioners to the Commission:

There are two: both Government officials with no fixed term of office. Their task is to represent United Kingdom interests. One of them is particularly concerned with legal matters.

He later stated:

There are four main current proposals. These are, first, for an additional protocol to the Revised Convention for the Navigation of the Rhine (1963), which will guarantee freedom to trade for subscribers to the convention and members of the EEC, but provide for possible controls of other shipping; second, the EEC Commission's application for Community membership of the Central Rhine Commission; third, proposals for new VAT and infrastructure charges; fourth, for the temporary laying-up of certain Rhine shipping, and for measures to deal with permanent surplus capacity.

The Minister described the estimated cost of membership to the United Kingdom in the current financial year as follows:

£50,000. This is mainly our contribution to running costs, but the figure includes a small sum for official time and travel. (*Hansard*, H.C. Debs., vol. 969, Written Answers, cols. 72-3: 25 June 1979.)

Part Three : III. E. *Subjects of international law—other subjects of international law—condominium*

In reply to a question on the subject of the New Hebrides, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

It is the intention of the British and French Governments to bring the territory to independence in 1980, if the people so decide, in accordance with a joint ministerial decision of July 1977. A Government of national unity was formed in the New Hebrides

in December 1978. (*Hansard*, H.C. Debs., vol. 962, Written Answers, col. 550: 14 February 1979.)

In reply to a series of questions on the subject of the New Hebrides, the Minister of State, Foreign and Commonwealth Office, wrote:

It will be open to the New Hebrides to apply for membership of the Commonwealth on independence, and as an 'overseas country and territory'—OCT—the New Hebrides will be eligible to apply for membership of the successor to the Lomé Convention.

... The Condominium is expected to achieve independence in 1980. The precise date is subject to discussion between the New Hebrides Government and the Governments of Britain and France.

... It is possible that an independence Bill will be needed to provide for the independence of the New Hebrides, but the precise requirements are still under consideration. (*Hansard*, H.C. Debs., vol. 969, Written Answers, col. 423: 2 July 1979.)

Part Four : I. *The individual in international law—nationality*

In moving the second reading in the House of Lords of the Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Bill, the Government spokesman, Lord Trefgarne, stated:

Before describing the contents of the Bill, I should like to trace very briefly the histories of the three countries concerned and follow by saying a few words about the reasons for the Bill's introduction. Papua, formerly a British Colony, was ceded to Australia in 1906. But it was not until 1921 that the Territory of New Guinea also came under the administration of Australia under a League of Nations Mandate. After the Second World War New Guinea was administered as a United Nations Trust Territory. On 16th September 1975, by the authority of the Australian Parliament, the two territories were united to form the independent State of Papua New Guinea. This State became a member of the Commonwealth on the same date, under the sovereignty of Her Majesty The Queen. Western Samoa, which had been administered as a Trust Territory, achieved independence from New Zealand in 1962; but it did not become a full member of the Commonwealth until 1970. Nauru, also a former Trust Territory, was until its independence in 1968 administered by Australia. It became a 'special' member of the Commonwealth later that year. Nauru's Commonwealth membership is 'special' only in that it does not participate in full—as distinct from regional—meetings of Commonwealth Heads of Government.

My Lords, as I am sure you will know, when British Colonies achieve independence from the United Kingdom and become members of the Commonwealth, their Independence Acts include provisions making consequential modifications to United Kingdom legislation. However, in order to achieve the same result for Papua New Guinea, Western Samoa and Nauru, which, as I have explained, were brought to independence by Australia and New Zealand, a separate Bill must be passed by this Parliament.

The proposed amendments to our legislation provided for in this Bill follow a well-established pattern. They flow automatically from the achievement of independence and membership of the Commonwealth of these countries. However, there is a particular problem which this Bill has been designed to resolve. That is the national status of the citizens of Papua New Guinea, Western Samoa and Nauru under United Kingdom law.

Until these three countries are designated members of the Commonwealth for the purposes of our British Nationality Acts, they are deemed to be foreign countries and their citizens are, strictly speaking, aliens. The Bill therefore includes a clause which adds Papua New Guinea, Western Samoa and Nauru to the list of Commonwealth countries in the British Nationality Acts, thus making their citizens Commonwealth citizens. It has not been possible, however, to backdate this provision to the date upon which each of these countries joined the Commonwealth. To do so would create confusion, since it would alter the status already enjoyed by a number of their citizens under our existing immigration laws. For example, leave of entry to the United Kingdom given under the Aliens Order, 1953, would no longer be valid for a person who became, retroactively, a Commonwealth citizen.

The Bill is also designed to resolve an anomaly which has arisen regarding the registration of births of children of United Kingdom citizens and deaths of such citizens which have occurred in Papua New Guinea since its independence. Since Papua New Guinea is until this Bill becomes law still technically a foreign country under the British Nationality Acts, these births and deaths may only be registered, under those Acts, in Consular registers. However, our mission in Papua New Guinea is a High Commission and not a Consulate, and accordingly has no Consular registers. This Bill, if enacted, will make Papua New Guinea a Commonwealth country under our law, and births and deaths occurring there may then be registered in the High Commission registers.

In order to deal with the births and deaths which took place there between independence and the enactment of this Bill, a provision is included enabling them to be registered retrospectively in the High Commission registers. We cannot extend this provision to Nauru or Western Samoa since we have no resident High Commission in either of those countries. (*Hansard*, H.L. Debs., vol. 403, cols. 1391-3: 13 December 1979; see also H.C. Debs., vol. 973, cols. 1592-4: 15 November 1979.)

Part Four : V. *The individual—statelessness, refugees*

In reply to the question what provisions of United Kingdom law give effect to Articles 3, 17, 24, 28, 31, 32 and 33 of the United Nations Convention on Refugees, the Secretary of State for the Home Department wrote:

At the time of ratification of the convention in 1954, it was considered that statutory provisions were not necessary to enable the United Kingdom to meet its obligations under it. I have under consideration a number of suggestions in this connection made to me by the London representative of the United Nations High Commissioner for Refugees. (*Hansard*, H.C. Debs., vol. 961, Written Answers, cols. 3-4: 22 January 1979.)

In the course of a debate in the House of Commons on the subject of refugees, the Minister of State, Home Office, Mr. T. Raison, stated:

I may repeat that the criterion for the grant of refugee status under the 1951 United Nations convention is that a person who is in the territory of a contracting State is unwilling to return to his country owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The convention bites only when the refugee—or potential refugee—is within the

jurisdiction of the State deciding the issue of refugee status. It therefore follows that these cases which, through the policy of the Government of the day, are considered from overseas do not come within the scope of the convention, nor are they covered by the immigration rules. They are admitted, with refugee status granted upon admission, under the discretion of the Secretary of State. They do not come within the scope of discussions of United Kingdom refugee procedures under the convention. The decision that people who are overseas should be admitted and thus acquire refugee status is a matter for ministerial discretion and must remain so. (*Hansard*, H.C. Debs., vol. 967, cols. 1374-5: 25 May 1979.)

Reference was then made to a memorandum submitted to the Home Secretary in March 1978 by Mr. Heidler, London representative of the United Nations High Commissioner for Refugees, in which, *inter alia*, he suggested that the Convention relating to the Status of Refugees 1951 should be incorporated into United Kingdom law. Mr. Raison stated:

First, there is the important proposal made by my hon. Friend that the United Nations convention should be incorporated into United Kingdom law. There is nothing in the convention which requires this to be done, nor is there any general principle under which international treaties or conventions ratified by the United Kingdom become part of our law. The normal procedure is to consider, before ratification, whether the existing provisions of the law cover any new obligations under a convention or treaty. If they do not, the law is amended and ratification follows. If they do, nothing further is generally seen to be necessary.

In the case of the convention, the Government of the day were satisfied that legislation coverage was adequate and ratification took place without legislation. That remains the position. No *prima facie* case of substance has been made out for the incorporation of the convention into our law. I am sure that no one in the House wants unnecessary legislation. We cannot legislate on the basis of theories. There must be a real need.

It is alleged that our present procedures result in refugees being sent to countries where they will face persecution. That, after all, is the crux of the matter. Indeed, Mr. Heidler has said that to his knowledge no refugee falling within the terms of the convention has been expelled from the United Kingdom in recent years. I think that my hon. Friend confirmed that. Therefore, I am not persuaded that the convention should be incorporated into our law. (*Ibid.*, col. 1376.)

In the course of a debate in the House of Commons on the subject of Vietnamese refugees in Hong Kong, the Secretary of State for the Home Department, Mr. Whitelaw, stated:

As for our saying that we would, irrespective of the circumstances, take people for settlement, I must tell the right hon. Gentleman that of course our international obligations require the master of a British ship to assist those in distress at sea but that normal international practice is for the country of the next port of call to take in people so rescued.

... There is an international obligation on the master of a British ship to assist people in distress at sea. It is also a matter for the international organisations and for the United Nations Commissioner for Refugees thereafter to do everything they can to

help companies in a very difficult situation. (*Hansard*, H.C. Debs., vol. 968, cols. 31–2: 11 June 1979.)

Part Four: VI. *The individual—immigration and emigration, extradition, expulsion and asylum*

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Spanish embassy gave notice on 13 April 1978 of its Government's wish to terminate the extradition treaty. An offer to negotiate a new treaty was made to the Spanish Government with the aim of avoiding a period with no treaty in force. The termination notice remained effective, however, and the treaty terminated on 13 October 1978. Correspondence is continuing with the Spanish authorities with a view to finding a mutually acceptable basis for negotiation of a new treaty. (*Hansard*, H.C. Debs., vol. 961, Written Answers, cols. 168–9: 24 January 1979.)

In reply to the following question:

. . . how, in any case where the United Kingdom is under a treaty obligation, where extradition is not granted, to submit the case to its competent authority for the purpose of prosecution (as with the amended treaty with Israel), it is proposed to comply in the absence of extra-territorial jurisdiction being conferred on United Kingdom courts and the power to receive written evidence taken abroad.

the Under-Secretary of State, Home Office, wrote:

The obligation under such bilateral treaties to submit a case to the competent prosecution authority does not import an obligation to prosecute. Prosecution may in any event be precluded by the extent of the extraterritorial jurisdiction of the requested State, or practical inability to put the offender on trial (for example, because of lack of witnesses). (*Hansard*, H.C. Debs., vol. 963, Written Answers, cols. 405–6: 5 March 1979.)

The following tables, produced by the Secretary of State for the Home Department in reply to a question, give information about magistrates' courts proceedings for the period 1974–8 in respect of persons whose surrender was formally requested under treaties to which the Extradition Act 1870 applies, or under the Fugitive Offenders Act 1967, and whose cases have been finally determined.

Where the magistrates' court did not commit the person concerned for surrender, this will normally have been because the court was not satisfied that sufficient evidence had been produced to justify committal.

There was one occasion in the past five years when a fugitive committed for surrender by the courts was not surrendered at the discretion of the Secretary of State. This concerned the request from Malta to which the table for 1977 refers. The decision was reached largely on humanitarian grounds.

UNITED KINGDOM MATERIALS ON

			1978		
Country		Number of persons	Principal offence in each case	Number of persons not committed by magistrate on any charge	Principal offence with which persons referred to in column (4) were charged or of which they were convicted
Australia		2	Robbery. Obtaining property by deception.		
Cyprus		1	Murder.		
Denmark		2	Drug offences (2).	1	Drug offences.
France		2	Murder.		
Federal Republic of Germany		5	Robbery. Kidnapping. Indecent assault. Wounding with intent. Theft. Obtaining property by deception.	1	Wounding with intent.
Hong Kong ..		1	Obtaining pecuniary advantage by deception.		
Israel		1	Wounding with intent.		
Italy		1	Manslaughter.		
Netherlands ..		1	Theft.		
New Zealand ..		1	Theft.		
Switzerland ..		2	Robbery. Obtaining property by deception.		
United States ..		2	Murder. Forgery.		

			1977		
Country		Number of persons	Principal offence in each case	Number of persons not committed by magistrate on any charge	Principal offence with which persons referred to in column (4) were charged or of which they were convicted
Australia		7	Rape. Drug offences (3). Obtaining property by deception. Theft. Conspiracy to defraud.		
Denmark		1	Forgery.		
France		2	Obtaining property by deception.	1	Obtaining property by deception.
Federal Republic of Germany		3	Theft (3).		
India		2	Obtaining property by deception (2).		
Italy		5	Conspiracy to murder. Murder (2). Burglary. Robbery.	1	Conspiracy to murder.
Malta		1	Forgery.		
Nigeria		1	Theft.		
Singapore		1	Conspiracy.	1	Conspiracy.
United States ..		1	Drug offences.		
Yugoslavia		1	Theft.	1	Theft.

			1976		
Country		Number of persons	Principal offence in each case	Number of persons not committed by magistrate on any charge	Principal offence with which persons referred to in column (4) were charged or of which they were convicted
Australia		1	Obtaining property by deception.		
Belgium		1	Forgery.		
Canada		3	Obtaining property by deception. Theft (2).		
Finland		1	Forgery.	1	Forgery.
France		2	Theft (2).	1	Theft.

1976 (cont.)

Federal Republic of Germany	2	Murder. Obtaining property by deception.		
Gibraltar	1	Murder.		
Italy	1	Burglary.	1	Burglary.
Netherlands ..	1	Attempted murder.		
New Zealand ..	2	Conspiracy to cheat and defraud (2).		
Spain	1	Burglary.	1	Burglary.

1975

Country	Number of persons	Principal offence in each case	Number of persons not committed by magistrate on any charge	Principal offence with which persons referred to in column (4) were charged or of which they were convicted
Australia	3	Theft. Conspiracy to cheat and defraud (2).		
Bermuda	1	Theft.		
Canada	1	Theft.		
France	1	Murder.		
Federal Republic of Germany	3	Murder. Robbery. Rape.		
Greece	1	Theft.		
Hong Kong ..	1	Bribery.		
New Zealand ..	1	Theft.		
Nigeria	1	Theft.	1	Theft.
Sweden	1	Drug offences.		
United States ..	2	Drug offences. Wounding with intent.	1	Wounding with intent.

1974

Country	Number of persons	Principal offence in each case	Number of persons not committed by magistrate on any charge	Principal offence with which persons referred to in column (4) were charged or of which they were convicted
Austria	1	Burglary.	1	Burglary.
Canada	2	Robbery. Theft.		
Federal Republic of Germany	3	Robbery. Forgery (2).		
Norway	1	Rape.		
Sierra Leone ..	1	Theft.	1	Theft.
Sweden	1	False accounting.	1	False accounting.
Switzerland ..	1	Murder.		
United States ..	2	Indecent assault. Theft.		

Hansard, H.C. Debs., vol. 965, Written Answers, cols. 289-94: 29 March 1979.)

In reply to a question, the Minister of State, Home Office, wrote:

Work is currently proceeding on the preparation of a draft extradition convention among the member States of the EEC. As at present envisaged, the convention would establish uniform extradition procedures among the Nine, though our present arrangements with the Republic of Ireland would probably not be disturbed, and would oblige a State which refused, in certain circumstances, to surrender a person to another EEC country to ensure that its own prosecuting authorities considered whether the person should be prosecuted. In October 1978 Ministers of Justice of the Nine decided that priority should be given to this work, in recognition of the special need for co-operation within the EEC in criminal law to ensure that criminals do not profit from the ease of movement across the national frontiers of the Community. (*Hansard*, H.C. Debs., vol. 969, Written Answers, col. 185: 27 June 1979.)

In reply to a question, the Attorney-General wrote that he would not institute extradition proceedings against Idi Amin on a charge of murdering British

citizens while he was Uganda's head of State (*Hansard*, H.C. Debs., vol. 970, Written Answers, col. 701: 18 July 1979).

In reply to a question, the Minister of State, Home Office, wrote:

Nationals of other EEC member States are treated alike for immigration control purposes, except that citizens of the Irish Republic are normally admitted freely to this country. We have no plans to alter these arrangements. In addition, French and Dutch nationals who derive their nationality from a connection with an overseas dependency do not at present enjoy full free movement rights under the immigration rules. This provision is under review. (*Hansard*, H.C. Debs., vol. 970, Written Answers, col. 778: 19 July 1979.)

In the course of a written reply, the Minister of State, Home Office, released the following table.

NUMBER OF FUGITIVES EXTRADITED TO THE REPUBLIC OF IRELAND				
	Aug-Dec 1975	1976	1977	1978
Murder	—	1	—	—
Other offences against the person	1	1	3	2
Sexual offences	—	—	1	—
Theft Act offences	12	19	24	18
Forgery	5	—	1	2
Other offences	2	6	2	4
Total:—	20	27	31	26

(*Hansard*, H.C. Debs., vol. 971, Written Answers, cols. 389-90: 26 July 1979.)

In the course of answering questions on the extradition of persons now residing in the Irish Republic, the Secretary of State for Northern Ireland, Mr. Atkins, stated:

Extradition procedures have in practice proved ineffective because the Irish High Court has found cause not to grant extradition for offences which are claimed to be political or to be associated with political offences. (*Hansard*, H.C. Debs., vol. 972, col. 610: 24 October 1979.)

In reply to the question whether consideration had been given to the compliance of the new Immigration Rules with the provisions of the European Convention on Human Rights, the Under-Secretary of State, Home Office, Lord Belstead, stated:

Yes, we have taken this seriously into account. (*Hansard*, H.L. Debs., vol. 402, col. 1276: 14 November 1979.)

In the course of a debate in the House of Commons on the subject of the new Immigration Rules, the Secretary of State for the Home Department, Mr. Whitelaw, stated:

. . . it is a tradition that the Government do not disclose any advice that they may

receive from the Law Officers. However, the Government have, of course, considered collectively the full implications of these proposals, including the question raised today about international obligations under the European Convention on Human Rights. We believe that we have strong arguments with which to justify those proposals if they are challenged. (*Hansard*, H.C. Debs., vol. 975, col. 352: 4 December 1979; see also vol. 975, Written Answers, col. 419: 10 December 1979.)

Part Four : VII. *The individual—protection of human rights and fundamental freedoms*

In reply to the question whether the Government would reconsider the decision not to sign the Optional Protocol of the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Government have kept this question under review, and our decision is still against ratifying the Optional Protocol at the present time. In some respects it compares unfavourably from the individual's standpoint with the procedure established by article 25 of the European Convention on Human Rights, to which the United Kingdom has acceded. (*Hansard*, H.C. Debs., vol. 962, Written Answers, col. 262: 8 February 1979.)

In answer to the question what steps Her Majesty's Government had taken to implement a decision of the House of Lords urging the introduction of a Bill of Rights to incorporate the European Convention on Human Rights, the Lord Chancellor, Lord Elwyn-Jones, stated:

. . . my right honourable friend the Home Secretary and I, while recognising the importance of this matter and giving due weight to the view expressed by this House at the end of the debate last November, remain of the opinion that there is not at present sufficient agreement to justify taking a step of such major constitutional significance. That being so, it would not be right for the Government now to seek by legislation to incorporate the European Convention into our law, since we do not ourselves consider that the case for this has been made out.

. . . the Government have allowed the right of individual petition to the European Court of Human Rights, and those who are not satisfied with the provisions in our own law are entitled so to petition; and that arrangement will of course continue. The difficulty is that the language of the convention itself is in such broad and generalised terms that it does not fit into our concept of what Statute law ought to be. If it were incorporated into our law it would be liable to create both considerable disappointment and a great deal of litigation. (*Hansard*, H.L. Debs., vol. 399, cols. 1583-4: 28 March 1979.)

In reply to the question what steps were being taken to ensure the end of religious and national oppression in the Soviet Union and the East bloc countries and to see that these countries respect human rights and fundamental freedoms as expressed in United Nations general declarations and the Helsinki Final Act, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government look to the States which have signed the Universal Declaration of Human Rights and the Final Act of Helsinki, including the Soviet Union and the

countries of Eastern Europe, fully to implement the provisions of those documents. We shall continue to stress this to the Governments concerned bilaterally and at the meeting in Madrid in November 1980 which will review the implementation of the Final Act. (*Hansard*, H.C. Debs., vol. 969, Written Answers, col. 420: 2 July 1979.)

In reply to a question on the subject of a Soviet dissident, Anatoly Shcharansky, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government will press for the implementation of the Helsinki Final Act. We shall also make representations to the Soviet Government about individual human rights cases where there is a direct connection with the United Kingdom. In cases like Mr. Shcharansky's, where there is no direct connection, we shall make decisions about representations on a case by case basis, and, among other considerations shall bear in mind health questions. (*Hansard*, H.C. Debs., vol. 970, Written Answers, col. 415: 16 July 1979.)

In reply to the question when does the Government plan to incorporate the European Convention on Human Rights into domestic British law, the Under-Secretary of State, Home Office, wrote:

The Government are considering this question in the light of our view that important constitutional issues of this kind should be the subject of the fullest discussion, but have come to no final conclusion. (*Hansard*, H.L. Debs., vol. 401, col. 1122: 12 July 1979.)

In reply to a question on the subject of Colonel Lev Ovsischer and his wife, waiting to leave the Soviet Union for Israel since 1972, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government will continue to press for full implementation of the Helsinki Final Act. We shall make representations to the Soviet authorities about individual human rights cases with a direct United Kingdom connection. Where this is not so, we shall take decisions about representations on a case by case basis, taking into account a number of factors including the chances of success. Colonel Ovsischer's case, which is one of these, will be borne in mind in the contacts which we have with the Soviet authorities on this subject. (*Hansard*, H. C. Debs., vol. 971, Written Answers, col. 500: 27 July 1979.)

In reply to a question on the subject of the apparent infringements by Czechoslovakia of Article 14 of the United Nations Covenant on Civil and Political Rights in respect of the arrest and forthcoming trial of members of the Charter 77 group, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Nations Human Rights Commission will not meet until February 1980, but it is possible that other suitable opportunities to discuss the matter at international meetings may arise. Ministers have already made clear to the Czechoslovak authorities that the Government share the widespread revulsion about the treatment of supporters of the Charter 77 movement in Czechoslovakia and the member countries of the European Community collectively have also made their feelings known. The Government deplore the sentences passed on 23 October on six signatories of the Charter, and consider the actions of the Czechoslovak authorities inconsistent with their obligations under the United Nations Covenant on Civil and Political Rights, and with the

provisions of the Final Act of the conference on security and co-operation in Europe. (*Hansard*, H. C. Debs., vol. 972, Written Answers, col. 560: 31 October 1979).

During the debate on the report stage of the Bill of Rights Bill in the House of Lords, the Lord Chancellor, Lord Hailsham, stated:

There is of course no provision in the treaties establishing the Communities which affords formal protection for the fundamental rights of Community citizens. This is the *status quo*. On 11th June this year the Commission published a memorandum suggesting that this should be remedied, first, in the medium term by accession of the Communities to the European Convention on Human Rights; and secondly, in the long-term, by drawing up a catalogue of rights to be enshrined in the Community law. I understand that the Commission itself believes that it is not possible to agree on the second alternative in the short term. It cannot draw up its own catalogue, and therefore I think we can drop it there for the time being. The Commission has therefore concentrated on the first of the two alternatives—accession to the European Convention. However, the Commission regards that as a first step in the direction of the long-term objective of a catalogue of rights.

The present situation is as follows. The memorandum has been sent to the Member States and institutions of the Communities and to the Council of Europe. The suggestion of the Commission is that Article 235 of the EEC Treaty could provide a basis for Community accession to the European Convention, although it has admitted that Article 236 might be more appropriate. I am told that we have reservations about the use of Article 236 for this purpose. The Commission's aim is to encourage discussion of the issues among interested parties. The Presidency have said that they intend to bring the subject to the Council of Ministers this year. This will provide an opportunity for a preliminary and general exchange of views. (*Hansard*, H.L. Debs., vol. 403, cols. 505–6: 29 November 1979.)

In the General Assembly of the United Nations on 18 December 1979, the United Kingdom delegate, Mr. R. Edis, gave an explanation of vote in respect of the draft Convention on the Elimination of Discrimination against Women. The statement ran in part as follows:

As demonstrated by the fact that my delegation, along with the delegation of France, proposed an alternative preamble to the draft Convention on the Elimination of Discrimination against Women in the Third Committee, my delegation has serious reservations about the preamble to the Convention. Our reservations go wider than the preamble.

... In addition to those which we have indicated about the preamble, I wish to give some examples of our reservations about the substantive part of the Convention. During the discussion of Article 9 my delegation pointed out that, in accordance with its obligations under the United Nations Convention on the Nationality of Married Women, the British Government treats women more favourably than men in relation to the acquisition of nationality. The British Government may wish to continue to do so and therefore my delegation asked in the Working Group for clarification about how far privileged treatment towards women was compatible with the provisions of Article 9. Unfortunately because of the haste with which the Working Group was proceeding, my delegation was given no answer on this important matter, and our question stands.

In addition, we are unable to accept Articles 15 and 16 in their present form, since the British system of immigration control, which the British Government consider fair and reasonable, might none the less be argued to be in contravention of these Articles as they are at present worded. We remain dissatisfied with the formulation of a number of other Articles of the draft Convention; for example Article 29 on the judicial settlement of disputes; and we are still concerned about the question of the application of the Convention to armed forces. (Text provided by the Foreign and Commonwealth Office.)

Part Five : III. *Organs of the State—Departments of the State*

In reply to the question how many foreign countries are able directly to approach departments of Her Majesty's Government other than the Foreign and Commonwealth Office to discuss British internal affairs, the Prime Minister wrote:

All foreign countries which maintain missions accredited to the Court of St. James's conduct their business with Ministers and officials of Her Majesty's Government under the auspices of the Foreign and Commonwealth Office. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 43: 19 February 1979.)

In reply to another question, the Prime Minister wrote:

Contacts between Ministers and officials of Her Majesty's Government and those of the Government of the Republic of Ireland are made under the auspices of the Foreign and Commonwealth Office. (*Ibid.*)

Part Five : IV. *Organs of the State—diplomatic agents and missions*

In reply to a question about the possibility of re-establishing diplomatic links with Albania, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

There are two main outstanding problems in British-Albanian relations. First, the Albanians have not paid the compensation awarded to Britain by the International Court of Justice in 1949 in respect of the Corfu Channel incident. Second, there is the long-standing problem of the gold formerly belonging to the pre-war Bank of Albania which is now in the custody of the Tripartite Commission for the restitution of monetary gold. The solution to the latter problem does not depend on the British Government alone; but the Albanian Government have not so far been prepared to discuss the question of restoring diplomatic relations until it has been solved. The British Government have made it clear on a number of occasions that they would be glad to find a way round these obstacles which have prevented the restoration of diplomatic relations for so long. (*Hansard*, H.C. Debs., vol. 964, Written Answers, col. 537: 20 March 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government have no diplomatic relations at the present time with the following States:

The People's Republic of Albania.
Republic of Comoros.
Republic of Guatemala.

Republic of São Tomé and Príncipe.
Republic of Uganda.

(*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 687: 22 March 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Security arrangements for British diplomatic staff abroad are made in conjunction with the host Governments, with whom overall responsibility for protection rests in accordance with the Vienna Convention. The arrangements vary from country to country and from one situation to another. (*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 636: 3 April 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The withdrawal of a British Ambassador or High Commissioner without a severance of diplomatic relations has occurred in the following cases in the past 10 years:

(a) *Uganda*. On 13 October 1972 the High Commissioner was withdrawn following a request from President Amin in the context of the expulsion of the Asian community from Uganda.

(b) *Chile*. On 30 December 1975 the Ambassador was withdrawn following the torture while in detention of a British subject resident in Chile.

(c) *Argentina*. On 19 January 1976 the Ambassador was withdrawn at the suggestion of the Argentine Government following developments concerning the Falkland Islands.

(d) *Nigeria*. On 4 March 1976 the High Commissioner was withdrawn on grounds of unacceptability to the Nigerian authorities. (*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 733: 4 April 1979.)

On 5 September 1979, Her Majesty the Queen issued Letters Patent under the Great Seal appointing Sir Anthony Parsons as Permanent Representative of the United Kingdom to the United Nations. The text of the Letters Patent is reproduced here as being of general interest.

Whereas, for the better treating of and arranging any matters which are now in discussion, or which may come into discussion, between Us, in respect of Our United Kingdom of Great Britain and Northern Ireland, and other Powers or States, arising out of proceedings of the United Nations or any inter-governmental agency related thereto; or between Us, in respect of our United Kingdom of Great Britain and Northern Ireland, and the United Nations or any inter-governmental agency related thereto; We have judged it expedient to invest a fit person with Full Power to conduct negotiations on Our part, in respect of Our United Kingdom of Great Britain and Northern Ireland; Know ye, therefore, that We, reposing especial Trust and Confidence in the Wisdom, Loyalty, Diligence and Circumspection of Our Trusty and Well-beloved **Sir Anthony Derrick Parsons**, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, Member of our Royal Victorian Order, upon whom has been conferred the decoration of the Military Cross, Permanent Representative of the United Kingdom to the United Nations, have named, made, constituted and appointed, as We do by these Presents name, make, constitute and appoint him Our undoubted Commissioner, Procurator and Plenipotentiary in respect of Our United Kingdom of Great Britain and Northern Ireland; Giving to him all manner of Power and Authority to treat, adjust and conclude with such Minister or Ministers, Plenipotentiary or Plenipotentiaries as may be vested with similar Power and Authority on the part of other Powers or States, or on the part of the United

Nations or any inter-governmental agency related thereto, any Treaty, Convention, Agreement, Protocol or other Instrument between Us and such Powers or States, or between Us and the United Nations or any inter-governmental agency related thereto, and to sign for Us, and in Our name, in respect of Our United Kingdom of Great Britain and Northern Ireland, everything so agreed upon and concluded, and to do and transact all such other matters as may appertain thereto, in as ample manner and form, and with equal force and efficacy, as We Ourselves could do, if personally present; Engaging and Promising, upon Our Royal Word, that whatever things shall be so transacted and concluded by Our said Commissioner, Procurator and Plenipotentiary, in respect of Our United Kingdom of Great Britain and Northern Ireland, shall, subject if necessary to Our Ratification, be agreed to, acknowledged and accepted by Us in the fullest manner, and that We will never suffer, either in the whole or in part, any person whatsoever to infringe the same, or act contrary thereto, as far as it lies in Our power. (Text provided by the Foreign and Commonwealth Office.)

In reply to questions, the Minister of State, Foreign and Commonwealth Office, wrote:

The Governments of the following States are recognised by Her Majesty's Government but there has been no representative at ambassadorial level accredited or nominated to London within the last year.

Afghanistan	Guinea-Bissau	Monaco
Albania	Haiti	Mozambique
Angola	Holy See	Nauru
Bhutan	Kampuchea	San Marino
Cape Verde	Kiribati	Surinam
Chad	Laos	Tuvalu
Chile	Liechtenstein	Western Samoa
Guatemala	Maldives	

. . . There are no set criteria for considering whether or not to accept representation in the United Kingdom of a foreign country at ambassadorial level.

. . . Her Majesty's Government recognise the Governments of Albania, Argentina, Bhutan, Chile, Guatemala, Kampuchea and The People's Democratic Republic of Yemen, but have not been represented at ambassadorial level, either resident or non-resident, within the last year. (*Hansard*, H.C. Debs., vol. 974, Written Answers, cols. 15-16: 19 November 1979.)

In the course of a debate in the House of Commons on the subject of the attack on the British Embassy in Tehran on 5 November 1979, the Minister of State, Foreign and Commonwealth Office, Mr. Hurd, stated:

We have protested strongly to the Iranian Government at this attack on our embassy. A protest was made to the Ministry of Foreign Affairs in Tehran and I spoke yesterday afternoon to the counsellor in charge of the Iranian embassy here. It is imperative that the Iranian Government fulfil their obligations under the Vienna convention and take adequate measures to protect diplomatic lives and premises.

Later in the same debate, Mr. Hurd said:

If there be a Government, calling themselves a Government, in Tehran, one of their clear duties under international law is to protect the diplomats accredited to them.

. . . Further action will be required to bring home to the authorities in Tehran that under international law they have a clear obligation, which they have been neglecting. (*Hansard*, H.C. Debs., vol. 973, cols. 225-7: 6 November 1979.)

In the course of reporting to the House of Commons the results of the meeting of the Foreign Ministers of the E.E.C. countries held on 20 November 1979, the Lord Privy Seal, Sir Ian Gilmour, stated:

On Iran, Ministers made the following statement:

Ministers of the Nine meeting in Brussels on 20 November considered the latest developments in Iran. They expressed their deep concern at the fact that the Iranian authorities have not fulfilled their obligations under the Vienna Convention and have not given appropriate protection to both the staff and the premises of the American Embassy in Tehran. They have already made their concern known to the Iranian authorities on several occasions through diplomatic channels.

At their meeting today, the Ministers recalled that in 1976 the European Council expressly condemned any attempt to exert pressure on governments by the taking of hostages. They consider that whatever the nature of the dispute between Iran and the United States the continued holding of diplomatic personnel of the Embassy of a foreign State as hostages and the threat to put them on trial is a breach of international law and as such must be rejected by the Governments of the Nine and the international community as a whole. The Ministers reject this violation of international law and call upon the Iranian Government to release all the hostages. (*Hansard*, H.C. Debs., vol. 974, col. 583: 27 November 1979.)

At the 2,182nd Meeting of the United Nations Security Council, held in New York on 29 December 1979, the Permanent Representative of the United Kingdom to the United Nations, Sir Anthony Parsons, stated in part:

Almost a month has passed since we last met here in open Council to consider this problem. On that occasion the Council unanimously called on the Government of Iran to release the personnel of the American Embassy held hostage in Tehran. In the statements made in the Council at that time there was equal unanimity in condemning this unique and, in modern times, unprecedented act. However, notwithstanding the subsequent efforts by the Secretary-General, notwithstanding the unanimous Order of the International Court of Justice that Iran should immediately release the hostages, notwithstanding initiatives taken by other individuals, the deadlock continues. The hostages are still incarcerated. The Iranian authorities remain in flagrant violation of the Vienna Convention on Diplomatic Relations, of other United Nations conventions, of general international law and long-standing practice of States. (S/PV. 2182, p. 11.)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

The Government have decided to grant, as a matter of courtesy, diplomatic status to the Apostolic Delegate, who is thus a diplomatic agent within the meaning of the Diplomatic Privileges Act 1964, with effect from 1st November. He continues, however, not to be accredited to the Court of St. James's as a Head of Mission, but rather to the Roman Catholic hierarchy of England, Wales and Scotland. Diplomatic status also now extends to the Delegate's Counsellor and to the premises and property of the

Delegation. The question of any further changes in the status of the Apostolic Delegate is kept under review. (*Hansard*, H.L. Debs., vol. 403, cols. 683-4: 4 December 1979.)

In reply to a further question on the same subject, the Lord Privy Seal wrote:

As a matter of courtesy, the Government have already, with effect from 1 November 1979, granted diplomatic status to the Apostolic Delegate, who is thus a diplomatic agent within the meaning of the Diplomatic Privileges Act 1964. However, as before, he continues not to be accredited to the Court of St. James's as a head of mission. (*Hansard*, H.C. Debs., vol. 975, Written Answers, cols. 560-1: 11 December 1979.)

Part Five: VI. *Organs of the State—special missions*

The Foreign and Commonwealth Office provided the following memoranda for the purposes of evidence taken on 30 October 1979 by the Parliamentary Joint Committee on Statutory Instruments:

SOUTHERN RHODESIA (IMMUNITY FOR PERSONS ATTENDING MEETINGS AND CONSULTATIONS) ORDER 1979

Memorandum by the Foreign and Commonwealth Office

This Order is made under section 2 of the Southern Rhodesia Act 1965 which empowers Her Majesty in Council to make such provision in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia, as appears to Her to be necessary or expedient in consequence of any unconstitutional action taken therein.

Unconstitutional action in Southern Rhodesia may have certain consequences for persons connected with such action. The purpose of this Order is to confer legal immunity from such consequences on persons while they are in the United Kingdom for meetings and consultations for the purpose of achieving a peaceful settlement in Southern Rhodesia. Immunity is accorded by analogy to that accorded by the Diplomatic Privileges Act 1964, namely personal inviolability which includes immunity from any form of arrest or detention, and immunity from suit and legal process which includes immunity from criminal jurisdiction and, with certain exceptions, civil jurisdiction.

Supplementary Memorandum

Article 2(1) of the Order provides that a person to whom that Article applies shall, while within the United Kingdom, be entitled to the like immunity from suit and legal process and the like personal immunity as is accorded under the law in that behalf to a diplomatic agent accredited to Her Majesty. The relevant law is the Diplomatic Privileges Act 1964. Accordingly, the persons to whom the Article applies are entitled (not as diplomats but by virtue of the Order) to the same immunity from suit and legal process and the same personal inviolability as is accorded by that Act to diplomatic agents.

The object of granting such immunity and inviolability is to facilitate meetings and consultations in the United Kingdom for the purpose of achieving a peaceful settlement in Southern Rhodesia.

Second Supplementary Memorandum

The Order is not conceived of, or designed as, an extension of the provisions of, or the categories of persons covered by, the Diplomatic Privileges Act 1964. That Act amended the law on diplomatic privileges to give effect to the Vienna Convention on Diplomatic Relations—a Convention which is designed to give appropriate protection and immunity to the envoys of States in order that they may effectively exercise their functions free from the constraints which might be employed against them in the discharge of their mission if they did not enjoy such protection.

The Order is concerned with a different matter. At present, when meetings and consultations are taking place with a view to achieving a peaceful solution of the situation in Southern Rhodesia, it is considered that some of those whose presence at such meetings or consultations would assist in achieving a peaceful settlement might be inhibited from attending if there was a threat of being subject to legal proceedings. (The unilateral declaration of independence in Southern Rhodesia in November 1965 and later acts in and in relation to that territory may well give rise to such apprehensions.) Accordingly it was decided to make provision whereby this threat could be removed. The means adopted was to grant immunity from suit and legal process and personal inviolability. It would have been possible to have spelled out in detail what this entailed. However these immunities are those which are also accorded to diplomatic agents, and, as a convenient and short way of describing the immunities proposed, the Order, instead of detailing the specific components of the immunities and inviolability, grants them by reference to the comparable immunities granted, by the relevant law, to diplomatic agents. (*Parliamentary Papers*, 1978–9, House of Commons, Paper 146–ix, pp. 1–2.)

Part Five: VII. *Organs of the State—armed forces*

(See Part Five: VIII. B., *infra*.)

Part Five: VIII. A. *Organs of the State—immunity of organs of the State—diplomatic immunity*

In reply to a question, the Under-Secretary of State, Home Office, wrote:

The number of offences against the Theft Act 1968, including shoplifting offences, alleged to have been committed in England and Wales in the years 1972 to 1978 by persons entitled to diplomatic immunity where the possibility of criminal proceedings was not pursued in consequence of the entitlement is as follows:

1972	..	..	20	1976	..	..	25
1973	..	..	19	1977	..	..	24
1974	..	..	19	1978	..	..	23
1975	..	..	22				

Information about each incident is passed by the Home Office to the Foreign and Commonwealth Office, whose practice is to bring details of the alleged offences to the attention of the heads of mission concerned. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 750: 8 March 1979.)

[Editorial note: The following item should be regarded as part of *United Kingdom Materials on International Law 1978*.]

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, Mr. Tomlinson, stated:

The Vienna Convention on Diplomatic Relations, to which the United Kingdom is a party, provides that diplomatic bags shall not be opened or detained. [The Foreign Secretary] would, of course, take the gravest possible view were it to be shown that diplomatic privilege was being abused in order to import into this country weapons for illegal purposes.

In reply to the further question whether diplomatic bags should be screened, Mr. Tomlinson stated:

I think that my hon. Friend is reading too much into the reply that I gave when he drew the conclusions that he did. His proposals for screening would not be consistent with the Vienna Convention. (*Hansard*, H.C. Debs., vol. 954, cols. 1543-4: 26 July 1978.)

The Permanent Mission of the United Kingdom to the United Nations presented the following Note, dated 7 June 1979, to the Secretary-General of the United Nations on the subject of the study by the International Law Commission of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier:

The Government of the United Kingdom of Great Britain and Northern Ireland note that the International Law Commission has identified nineteen different issues concerning the status of the diplomatic courier and the bag not accompanied by courier. Of these nineteen, the Commission records that many are already covered by existing provisions of the Vienna Convention on Diplomatic Relations. Regarding those points on which the Convention is silent, the Government of the United Kingdom do not consider that there is any practical need for further legal regulation in the form of a Protocol additional to the Convention. The Vienna Convention already provides sufficient protection for the diplomatic courier and the diplomatic bag, accompanied or unaccompanied.

The Government of the United Kingdom also note that many of the delegations which expressed support for the elaboration of a Protocol during the Sixth Committee meetings on this item at the thirty-third session of the General Assembly were particularly concerned about the protection of the diplomatic bag not accompanied by courier. The Government of the United Kingdom agree that the unaccompanied bag should be given the same measure of protection by transit States and the receiving State as is accorded to the bag accompanied by diplomatic courier. But the provisions of paragraphs 1-4 of Article 27 of the Vienna Convention apply to both accompanied and unaccompanied bags. Further provision for bags unaccompanied by courier is made by paragraph 7 of that Article. It is the view of the Government of the United Kingdom that any problems there may be regarding protection of the bag unaccompanied by diplomatic courier can be solved by a more faithful compliance by all States with those legal provisions that already exist rather than by further regulation. (Text provided by the Foreign and Commonwealth Office.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Diplomatic courtesies which include exemption from customs duties and relief from

certain taxes are extended on a personal basis to the two remaining persons who were members of the former diplomatic missions of Latvia and Lithuania in this country. There is no Estonian representative to whom any diplomatic courtesies are extended. (*Hansard*, H.C. Debs., vol. 970, Written Answers, cols. 189-90: 11 July 1979.)

In reply to the question what was the policy of Her Majesty's Government in respect of immunity for members of the E.E.C. Assembly, the Lord Privy Seal wrote in part:

The Government apply the appropriate provisions of the protocol on the privileges and immunities of the European Communities of 8 April 1965. The protocol does not accord any exemption from Her Majesty's Customs and Excise control for Members of the European Parliament and they are not exempt from baggage examination. They enjoy such immunities as are set out in articles 9 and 10 of the protocol, which include immunity in respect of opinions expressed or votes cast by them in the performance of their duties. During sessions of the European Parliament, Members enjoy in their own country the immunities accorded to Members of their Parliament; in countries of other Member States they enjoy immunity from any measure of detention and from legal proceedings. Members of the European Parliament do not enjoy other immunities similar to those accorded to a diplomatic agent. (*Hansard*, H.C. Debs., vol. 973, Written Answers, cols. 39-40: 5 November 1979.)

In the course of a debate on 21 November 1979 in the Sixth Committee of the United Nations General Assembly on the Report of the International Law Commission, the United Kingdom representative, Mr. J. Freeland, observed:

On the topic of the Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Diplomatic Courier, I have to say that we remain unconvinced of the case for a new legal instrument. I must also confess that we were rather taken aback by the proliferation of topics and headings emerging from the studies of the Commission's Working Group and of its Special Rapporteur, a proliferation which, if unchecked, may lead to what would have the appearance of a major piece of law-making. I use the words 'have the appearance', because in reality the size of the problem involved is not great. What is surely beyond dispute is that the diplomatic bag, whether accompanied or unaccompanied, is already covered by the principles laid down in multilateral and bilateral conventions; and we are concerned that disproportionate time and effort should not be expended on unnecessary elaboration of those principles. As we have made clear previously, we believe that if there is a problem in this field, it is more a problem of abuse of diplomatic bag privileges. We trust that the further work which may be undertaken on the topic will take fully into account the disquiet which has been aroused about such abuse. (Text provided by the Foreign and Commonwealth Office.)

Part Five: VIII. B. *Organs of the State—immunity of organs of the State—immunity other than diplomatic*

In the course of a memorandum dated 26 March 1979 on the subject of the draft Air Navigation (Noise Certification) Order 1979, the Department of Trade wrote:

It is a principle of customary international law that a visiting force functioning as a force shall normally be exempt from the jurisdiction of the host State. (Fifteenth

Report from the Joint Committee on Statutory Instruments, *Parliamentary Papers*, 1978-9, House of Commons, Paper, 33-xxii, p. 6.)

The following letter dated 2 July 1979 was sent by the United Kingdom Permanent Representative to the Council of Europe to the Secretary-General of the Council of Europe on depositing the United Kingdom's instrument of ratification of the European Convention on State Immunity 1972:

On depositing its instrument of ratification the United Kingdom declared:

'(a) In pursuance of the provisions of paragraph 1 of Article 24 thereof, the United Kingdom hereby declare that, in cases not falling within Article 1 to 13, their courts and the courts of any territory in respect of which they are a Party to the Convention shall be entitled to entertain proceedings against another Contracting State to the extent that these courts are entitled to entertain proceedings against States not Party to the present Convention. This declaration is without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).

(b) In pursuance of the provisions of paragraph 2 of Article 19, the United Kingdom hereby declare that their courts, and the courts of any territory in respect of which they are a party to the Convention, shall not be bound by the provisions of paragraph 1 of that Article.

(c) In pursuance of the provisions of paragraph 4 of Article 21, the United Kingdom hereby designate as competent courts:

in England and Wales—the High Court of Justice;

in Scotland —the Court of Session;

in Northern Ireland —the Supreme Court of Judicature;

and in any other territory in respect of which they are a Party to the Convention
—the Supreme Court of the territory concerned.

The question whether effect is to be given to a judgment in accordance with paragraph 1 of Article 21 may however also be justiciable in other civil courts in the exercise of their normal jurisdiction.

'... simultaneously an instrument of ratification of the International Convention for the Unification of certain rules concerning the Immunity of State-owned Ships, done at Brussels on 10 April, 1926, and of the protocol supplementary thereto, done at Brussels on 24 May, 1934, is being deposited with the Government of the Kingdom of Belgium. This instrument of ratification, signed by Her Majesty The Queen in respect of the United Kingdom of Great Britain and Northern Ireland, contains the following reservations:

"We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of Our courts, or of Our courts in any territory in respect of which We are party to the Convention.

We reserve the right, with respect to Article 2 of the Convention, to apply in proceedings concerning another High Contracting Party or ship of another High Contracting Party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the Sixteenth day of May, in the Year of Our Lord One thousand Nine hundred and Seventy-two.

In order to give effect to the terms of any international agreement with a non-Contracting State, We reserve the right to make special provision

(a) as regards the delay or arrest of a ship or cargo belonging to such a State, and
 (b) to prohibit seizure of or execution against such a ship or cargo.”’ (*United Kingdom Treaty Series*, No. 74 (1979) (Cmd. 7742), pp. 18–19.)

In the course of a debate on 21 November 1979 in the Sixth Committee of the United Nations General Assembly on the Report of the International Law Commission, the United Kingdom representative, Mr. J. Freeland, referred to the Commission’s work on the topic of jurisdictional immunities of States and their property. He observed:

In particular, we welcome the extent to which the Commission’s report discloses a recognition that, in its future work on the topic, the Commission should be guided by state practice, including both judicial and administrative practice and practice at the level of treaty-making. There have been significant recent developments in this field in the United Kingdom . . . They include the entry into force of legislation which has enabled the United Kingdom to ratify the European Convention on State Immunity, the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships and the Supplementary Protocol to the latter Convention. In addition, the subject was among those discussed, on the welcome initiative of Australia, at a Commonwealth Law Ministers’ meeting at Winnipeg in August. The Ministers agreed that further work on the subject should be carried out in the Commonwealth context, including work on the particular questions posed in the case of federal states. We have no doubt that the topic is now ripe for the elaboration of rules by the Commission. We are also confident that the Commission is fully seized of the need, in such an elaboration, to have full regard to state practice reflecting accepted rules of international law. (Text provided by the Foreign and Commonwealth Office.)

On 30 November 1979, the British Embassy at Washington presented to the United States Department of State a Note (No. 229) on the subject of the International Air Transportation Competition Bills of 1979 (S 1300 and HR 5481) under consideration by the Congress of the United States. In the course of the Note, the British Embassy stated:

Section 23 of S 1300 (like Section 22 of HR 5481) is also, in the view of H[er] M[ajesty’s] G[overnment], open to serious objection insofar as it would enable the Civil Aeronautics Board to proceed to a public hearing or investigation in order to determine that a foreign government or its instrumentality had acted in an unreasonable, discriminatory or unjustifiable way. Such a proceeding would be, in effect, a judicial proceeding and the foreign state would be, in effect, the defendant. Yet not only is no provision made in the Bill for the foreign state to enter a plea of sovereign immunity, the foreign state (unlike its affected air carrier) is not given any notice of the proceedings or opportunity to make representations to the United States Government. HMG maintains that it would be contrary to the general principles of international law regarding sovereign immunity, and to the accepted practice among states as to the methods appropriate to disputes between them, if a domestic agency or tribunal were to be given powers to hold public hearings and reach public conclusions relating to the conduct of another government—particularly where the issue was in effect a dispute between the United States and the foreign government in question. In the United Kingdom, immunity would be accorded to foreign states were reciprocal

powers ever to be taken—immunity applies to proceedings before any tribunal exercising judicial functions, and the principal exceptions to immunity do not apply where the parties to the dispute are states (State Immunity Act 1978, Sections 3, 8, 9 and 22). Although the foreign state would not be required by Section 23 of the bill to appear in the proceedings, the failure to inform it or to give it an opportunity to make representations to the United States Government (contrary to any rules of due process) would mean that a determination highly adverse to its interests might be reached without any presentation by it of its position. On its face the Section would seem to be capable of application to disputes falling within Article 17 of the Agreement between the Government of the United Kingdom and the Government of the United States concerning air services, as well as to disputes falling within similar provisions in other bilateral air service agreements or under the Chicago Convention.

HMG support the reservations about Section 23 of the Bill which were put forward by the State Department. The suggestions made by the State Department, while not entirely meeting HMG's concern about the potential application of Section 23 against foreign governments, would go a long way to ensure that the Section was applied with practical regard for the methods which ought properly to be used by states to settle disputes between them. (Text provided by the Foreign and Commonwealth Office.)

Part Six : I. C. *Treaties—conclusion and entry into force—entry into force*

In reply to a question, the Secretary of State, Foreign and Commonwealth Office, wrote:

Council of Europe agreements are normally signed or ratified when this is in accordance with Government policy and in the national interest. It is, of course, necessary for the terms of such agreements to be consistent with existing United Kingdom law since Her Majesty's Government will not ratify any international agreement unless the United Kingdom is in a position to fulfil its obligations under that agreement. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 368: 23 February 1979.)

In reply to the questions: (1) what is the state of the procedure for ratification of those Council of Europe agreements which the Government have signed as at 31 December 1976, but which have not yet been ratified; (2) what agreements concluded in the Council of Europe framework have not yet been signed by the Government and for what reasons—the Minister of State, Foreign and Commonwealth Office, after referring to the above Written Answer, wrote:

The information is as follows:

(i) Five Council of Europe agreements, signed by the United Kingdom Government before 31 December 1976, have not yet been ratified. These are listed below, with a brief explanation of the state of procedure in each case.

Fourth Protocol to the European Convention on Human Rights

Her Majesty's Government is currently reviewing the question of ratification of the Fourth Protocol to the European Convention on Human Rights, but no decision has yet been taken.

European Convention on the Legal Status of Children born out of Wedlock

Her Majesty's Government is at present considering ratification but the matter of any necessary reservations remains to be resolved.

European Convention on State Immunity

It is hoped that the United Kingdom Instrument of Ratification will be deposited at the end of April.

Convention on the Establishment of a Scheme of Registration of Wills

This Convention can only be given effect by its incorporation into United Kingdom national law by Act of Parliament. Further, some consequential amendments would be necessary to existing legislation and rules. The Government are giving active consideration to both these matters.

Convention relating to stops on bearer securities in international circulation

Her Majesty's Government will give consideration to ratification following the conclusion of present consultations with those institutions which deal in bearer securities in international circulation. These centre upon the question of the United Kingdom participating in a stop list system.

(2) The United Kingdom has not signed the following Council of Europe Agreements:

1. Protocol to the European Code of Social Security.
2. European Convention on Social Security and Supplementary Agreements for the Application of the European Convention on Social Security.
3. European Convention on the Legal Status of Migrant Workers.
4. European Agreement on 'Au Pair' Placement.
5. Agreement on the Transfer of Corpses.
6. European Convention on Consular Functions and 2 Protocols.
7. Additional Protocol to the European Convention on State Immunity.
8. European Convention on the Establishment of Companies.
9. Additional Protocol to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality.
10. European Convention on the Service Abroad of Documents relating to Administrative Matters.
11. European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles.
12. European Convention on Civil Liability for Damage Caused by Motor Vehicles.
13. European Convention on Foreign Money Liabilities.
14. European Convention on the Place of Payment of Money Liabilities.
15. European Convention on Products Liability in regard to Personal Injury and Death.
16. Agreement relating to Application of the European Convention on International Commercial Arbitration.
17. European Convention providing a Uniform Law on Arbitration.
18. European Convention on the Calculation of Time Limits.
19. European Convention on Extradition with Additional and Second Additional Protocols.
20. European Convention on Mutual Assistance in Criminal Matters and Additional Protocol.

21. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.
22. European Convention on the Punishment of Road Traffic Offences.
23. European Convention on the International Validity of Criminal Judgments.
24. European Convention on the Transfer of Proceedings in Criminal Matters.
25. European Convention on the Repatriation of Minors.
26. European Convention on the Non Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes.
27. European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle.
28. European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe.
29. Additional Protocol to the European Convention on Information on Foreign Law.
30. European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters.

It is the practice of Her Majesty's Government to sign Agreements only where there is a genuine expectation of ratification within a reasonably short time span. The possibility of signature of several of the more recent agreements is therefore still under examination. Most of the other agreements have not been signed, either because their provisions are at least in some measure unacceptable to the United Kingdom or because there would be no practical advantage to the United Kingdom in adhering to the agreement. The question of signing these agreements is, however, kept under review. (*Hansard*, H.C. Debs., vol. 963, Written Answers, cols. 538-40: 5 March 1979.)

In reply to the question when the Government expects to ratify the U.N.E.S.C.O. Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government support the intentions behind this convention and voted for its adoption in 1970. Ratification would present legal and technical problems and new legislation would be necessary to implement it. The appropriate Government Departments are being consulted on this question. (*Hansard*, H.C. Debs., vol. 972, Written Answers, col. 154: 23 October 1979.)

Part Six: II. C. *Treaties—observance, application and interpretation—interpretation*

At the 164th meeting in the seventh session of the Human Rights Committee of the International Covenant on Civil and Political Rights, held in Geneva on 7 August 1979, the United Kingdom representative, Mr. Watts, stated:

The question also arose whether decisions under the European Convention [on Human Rights] concerning the meaning to be given to certain provisions in that Convention also applied to the equivalent provisions in the Covenant. In his delegation's view, it would be wrong to regard decisions under the European Convention as necessarily determining conclusively, for the purposes of the Covenant, the meaning of the words or phrases which appeared in both instruments. The two treaties had been concluded in different circumstances and nearly 20 years apart. Moreover, in view of the regional nature of the European Convention, it might not always be appropriate to apply interpretations

of its provisions to similar provisions in a world-wide instrument such as the Covenant. That did not mean that the decisions handed down under the European Convention should be disregarded altogether, since they were of persuasive weight for determining the meaning of equivalent terms used in the Covenant. (CCPR/C/SR. 164, p. 11.)

Part Six: II. D. *Treaties—observance, application and interpretation—treaties and third States*

(See also Part Eight: II. C., *infra*.)

In the course of moving the second reading in the House of Commons of the European Communities (Greek Accession) Bill, the Lord Privy Seal, Sir Ian Gilmour, stated:

The strict purpose of the Bill is clear enough. It is to ensure that, once Greece enters the Community on 1 January 1981, the United Kingdom, for its part, honours in full the obligations undertaken in the treaties of accession between Greece and the Community. The Bill will achieve that by amending the European Communities Act 1972 to provide that Greece's treaties of accession to the EEC, Euratom and the Coal and Steel Community are included among the basic Community treaties referred to in section 1 of the European Communities Act 1972. (*Hansard*, H.C. Debs., vol. 972, col. 1041; 30 October 1979.)

Part Six: IV. C. *Treaties—invalidity, termination and suspension of operation*

The following question was asked of the Government:

what negotiations have taken place between Her Majesty's Government and the Chinese Government concerning the extension, revision, cessation or other variation of the whole or any part of the Convention of Peking 1898; and whether Her Majesty's Government is considering ignoring or unilaterally abrogating any part of the treaty.

In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

No such negotiations have taken place. Her Majesty's Government have no intention of ignoring or unilaterally abrogating any part of the treaty. (*Hansard*, H.C. Debs., vol. 971, Written Answers, col. 401; 26 July 1979.)

Part Eight: II. A. *State territory and territorial jurisdiction—territorial sovereignty*

In the course of a debate in the House of Lords on United Kingdom/Argentine co-operation in scientific research in and around the Dependencies of the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

The illegal station in South Thule remains illegal. We have asserted, and continue to assert without reservation, our claim to sovereignty over South Thule, as indeed over these Dependencies generally. (*Hansard*, H.L. Debs., vol. 398, col. 590; 6 February 1979.)

Her Majesty's Government was asked the following question in the House of Lords:

Whether they consider the Soviet Union to have been observing the conditions laid

down in the Treaty of Paris regarding (a) Norwegian sovereignty in the Svalbard Archipelago, and (b) the demilitarised status of the archipelago, particularly in view of the crash of the Soviet bomber on one of the islands, the presence in its waters of a large, heavily armed Soviet warship, the establishment on another island of a helicopter base, and the presence of Soviet military personnel at the airbase.

In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

It is known to all the signatories of the Treaty of Paris that the Norwegian Government exercises sovereignty in full accordance with the provisions of the treaty and is concerned to ensure that its sovereignty is respected by all the signatories, including of course the Soviet Union.

The crash of a Soviet aircraft on Hope Island in the Svalbard Archipelago on 28th August 1978 was obviously an accident and not a deliberate act, and Her Majesty's Government understand that the subsequent presence of a Soviet warship was related to that crash and received Norwegian agreement. Her Majesty's Government also understand that the Soviet helicopter base on Svalbard is a civilian establishment manned by civilian personnel. Her Majesty's Government will continue to watch events in Svalbard with close attention. (*Hansard*, H.L. Debs., vol. 398, cols. 816-17: 7 February 1979.)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

Both individually and with the Nine we have appealed publicly to the Israel Government to halt all settlement of the occupied territories, which we regard as illegal and an obstacle to peace. The Government of Israel are in no doubt of our views, which are shared by Israel's two partners in the autonomy negotiations. (*Hansard*, H.L. Debs., vol. 402, col. 369: 30 October 1979.)

In reply to a question, the Lord Privy Seal wrote:

Successive British Governments have left the Argentine Government in no doubt as to British sovereignty over the Falkland Islands and their Dependencies. (*Hansard*, H.C. Debs., vol. 967, Written Answers, col. 295: 25 May 1979.)

[Editorial note: The Terms of Reference for negotiations between the British and Argentine Governments on the subject of the Falkland Islands and their Dependencies were announced on 26 April 1977 as follows:

The Governments of the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland have agreed to hold negotiations from June or July 1977 which will concern the future political relations, including sovereignty, with regard to the Falkland Islands, South Georgia and South Sandwich Islands, and economic co-operation with regard to the said territories, in particular, and the South West Atlantic, in general. In these negotiations the issues affecting the future of the Islands will be discussed, and negotiations will be directed to the working out of a peaceful solution to the existing dispute on sovereignty between the two states, and the establishment of a framework for Anglo-Argentine economic co-operation which will contribute substantially to the development of the Islands, and the region as a whole.

A major objective of the negotiations will be to achieve a stable, prosperous and politically durable future for the Islands, whose people the Government of the United Kingdom will consult during the course of the negotiations.

The agreement to hold these negotiations, and the negotiations themselves, are without prejudice to the position of either Government with regard to sovereignty over the Islands.

The level at which the negotiations will be conducted, and the times and places at which they will be held, will be determined by agreement between the two Governments. If necessary, special Working Groups will be established. (Text provided by Foreign and Commonwealth Office.)]

In signing on 26 October 1979 the Final Act of the 1979 Congress of the Universal Postal Union held in Rio de Janeiro, the Argentine Government made the following declarations:

I. In ratifying the Constitution of the Universal Postal Union signed in Vienna (Austria) on 10 July 1964, the Argentine Government expressly stated that Article 23 of the Constitution neither referred to nor included the *Islas Malvinas*, the South Georgia Islands, the South Sandwich Islands and Argentine Antarctica, since they form part of its territory and come under its authority and sovereignty.

The Argentine Republic explicitly reserves its legitimate rights to the *Islas Malvinas*, the South Georgia Islands, the South Sandwich Islands and Argentine Antarctica and consequently will not permit any declaration or reservation by any Union member or group of Union member countries which might undermine these rights.

II. The Argentine Republic particularly reserves its legitimate claims and rights to the *Islas Malvinas*, the South Georgia Islands, the South Sandwich Islands and Argentine Antarctica and points out that the provision contained in Article 25, Paragraph 1, of the Universal Postal Convention on the circulation of postage stamps valid in the country of origin will not be considered as obligatory for Argentina when these stamps distort Argentina's geographic and legal reality, without prejudice to the application of paragraph 15 of the joint Argentine-British Declaration of 1 July 1971 on communications and movement between Argentina's continental territory and the *Islas Malvinas*, approved by Exchange of Letters between the two Governments on 5 August 1971 and ratified by Law No. 19.529.

In reply, the United Kingdom made the following declaration:

1. The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to United Kingdom sovereignty over the Falkland Islands, the Falkland Island Dependencies and the British Antarctic Territory. In this context attention is drawn to Article IV of the Antarctic Treaty, to which both the United Kingdom and Argentina are parties, which freezes territorial claims in Antarctica.

2. The United Kingdom Government therefore do not accept the declaration of the Argentine Republic claiming to contest United Kingdom sovereignty over the above-mentioned territories, nor do they accept the declaration of the Argentine Republic concerning Article 25, para 1, of the Universal Postal Convention. (Texts provided by the Foreign and Commonwealth Office.)

The Final Protocol, dated 3 December 1979, to the Proceedings of the World Administrative Radio Conference held in Geneva contained a reservation by the Republic of Argentina. The reservation read in part:

The delegation of the Republic of Argentina hereby declares its Government does not recognize the frequency assignments which might be made directly or indirectly for any services, in any part of the radio spectrum, for the Falkland, South Georgia and

South Sandwich Islands and Argentinian Antarctica between longitudes 25° and 74°W and south of latitude 60°S, over which territories the Republic of Argentina exercises sovereign rights, if such assignments are made on behalf of another State or of other States. Moreover, the Republic of Argentina reserves the right to use as its own any radio frequencies assigned in the circumstances described.

The delegation of the Republic of Argentina hereby declares on behalf of its Government that the illegality of the United Kingdom occupation of the Falkland, South Georgia and South Sandwich Islands has been recognized by the United Nations which, in Resolutions 2065(XX), 3160(XXVIII) and 31/49, called for the acceleration of negotiations between both Governments in order to terminate the colonial situation.

The following declaration was made in reply by the United Kingdom.

With reference to the reservation in statement No. 45 by the Republic of Argentina, the Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to United Kingdom sovereignty over the Falkland Islands, the Falkland Island Dependencies, and the British Antarctic Territory. In this context attention is drawn to Article IV of the Antarctic Treaty, to which both the United Kingdom and Argentina are parties, which freezes territorial claims in Antarctica.

The United Kingdom Government therefore do not accept the declaration of the Argentine Republic claiming to contest United Kingdom sovereignty over the above-mentioned territories. Furthermore the United Kingdom is entitled to have frequencies assigned to it for radio services to be operated from these territories and would regard any use by the Argentine Republic of such frequencies which caused harmful interference to these assignments as a breach of the Convention and the Radio Regulations. The United Kingdom does not accept the assertion in the last paragraph of the Argentine declaration that the 'Illegality of the occupation of the Falkland, South Georgia and South Sandwich Islands by the United Kingdom had been recognized by the United Nations Organization'. United Nations Resolutions have simply called for the settlement of the dispute by negotiation between the two Governments.

The Final Protocol contained the following reservation by Chile:

The delegation of Chile, bearing in mind the agreements of the World Administrative Radio Conference, Geneva, 1979, concerning the frequency assignments in the Master International Frequency Register, the provisions of Article 4, paragraph 2 of the Antarctic Treaty signed at Washington on 1 December 1959, and the contents of No. VIII of the Final Protocol of the International Telecommunication Convention, Malaga-Torremolinos, 1973, states that its Government reserves the right to assign and recognize the frequencies which it considers necessary for present and future radio-communication services operating within the Chilean Antarctic territory, over which it exercises sovereignty.

The following declaration was made in reply by the United Kingdom:

The delegation of the United Kingdom of Great Britain and Northern Ireland does not accept reservation No. 7 by Chile in so far as it disputes the sovereignty of Her Majesty's Government in the United Kingdom over the British Antarctic Territory. The delegation notes the reference to Article 4 of the Antarctic Treaty which freezes territorial claims in Antarctica.

The Final Protocol contained a reservation by the Republic of Guatemala which read in part as follows:

The delegation of the Republic of Guatemala: reserves its Governments rights with regard to the acceptance and total or partial ratification of the Final Acts and their application within the territorial limits recognized by the Constitution of the Republic.

The following declaration was made in reply by the United Kingdom:

With reference to the reservation in statement No. 2 by the Republic of Guatemala, the Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the sovereignty of the United Kingdom over Belize and wish formally to reserve their rights on this question. (Texts provided by the Foreign and Commonwealth Office.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The position on the Argentine scientific station on Southern Thule remains unchanged. Southern Thule is British territory; we have protested at the Argentine presence and we have thus protected our position. (*Hansard*, H.C. Debs., vol. 974, Written Answers, col.687: 28 November 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The Argentines are in no doubt of our views concerning Southern Thule. (*Hansard*, H.C. Debs., vol. 975, Written Answers, col. 463: 10 December 1979.)

In the course of replying for the Government in a debate on the adjournment of the House of Commons, the Leader of the House, Mr. St. John-Stevas, stated in answer to a question about the Falkland Islands:

We have no doubt about our sovereignty over the Islands and their dependencies. The restoration of ambassadors in Argentina and diplomatic relations announced in November does not affect our position in any way. (*Hansard*, H.C. Debs., vol. 976, col. 394: 18 December 1979.)

Part Eight : II. C. *State territory and territorial jurisdiction—territorial jurisdiction—concurrent territorial jurisdiction*

In performance of its depositary duties under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, the Government of the United States of America transmitted to States parties to the Convention the following Note, dated 6 February 1979, on behalf of the Governments of France, the United Kingdom and the United States:

The Department of State refers to note No. 43 of June 28, 1978, from the Embassy of the Union of Soviet Socialist Republics regarding the statement of the Government of the Federal Republic of Germany on the application to West Berlin of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation which was done at Montreal on September 23, 1971.

Following consultations between the Government of the United States of America and the Governments of France and the United Kingdom of Great Britain and

Northern Ireland, the Department of State wishes to state the following on behalf of all three Governments.

In accordance with established procedures which were reaffirmed in the Quadripartite Agreement of September 3, 1971, the authorities of the three powers, before authorizing its extension to the Western Sectors of Berlin, reviewed this Convention which is primarily intended to establish a series of offenses against the safety of civil aviation, enumerated in article 1, and to create a framework in which those committing such offenses can be prosecuted and punished.

The authorities of the three powers do not accept the Soviet assertion that conventions relating to air service may not be extended to the Western Sectors of Berlin. For many years conventions of this nature including The Hague Convention of 1970 for the suppression of unlawful seizure of aircraft have been extended to the Western Sectors of Berlin, subject, whenever required, to appropriate allied reservations.

As far as civil aviation matters may be concerned, the authorities of the three powers have taken the necessary steps to ensure that allied rights and responsibilities in this field remain unaffected. The reference to allied rights and responsibilities contained in the federal government's declaration, mentioned in the embassy's note, was included to take account of the reservations laid down by the three powers following their review of the Montreal Convention.

Consequently, the validity of the Berlin Declaration made by the Federal Republic of Germany in accordance with the established procedures is unaffected and the application to the Western Sectors of Berlin of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation continues in full force and effect.

With reference to the communication from the Embassy of the Hungarian People's Republic in its Note No. 52/1978 of September 20, 1978, the Department of State, following consultation between the Governments of France, the United Kingdom and the United States and on behalf of all three governments, wishes to state that states which are not party to the Quadripartite Agreement are not competent to comment authoritatively on its provisions. The three governments do not consider it necessary, nor do they intend to respond to any further communications from states which are not party to the Quadripartite Agreement. They wish to point out that the absence of a response to further communications of a similar nature should not be taken to imply any change in their position on this matter. (Text provided by the Foreign and Commonwealth Office.)

The Foreign and Commonwealth Office addressed the following letter, dated 1 March 1979, to the Director-General of U.N.E.S.C.O. in respect of the accession of the German Democratic Republic (G.D.R.) to the Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971:

1. I have the honour to refer to Mr Perrenoud's letter of 12 October 1978, in which he informed me that the German Democratic Republic had acceded to the above convention.

2. Mr Perrenoud's letter contained a statement from a Verbal Note by the Minister of Foreign Affairs of the GDR, which included a reference to the Quadripartite Agreement of 3 September 1971, concluded in Berlin by the Governments of France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Government of the United Kingdom of Great Britain and Northern Ireland wishes to point out that the GDR,

which is not a party to the Quadripartite Agreement, is not therefore competent to comment authoritatively on its provisions.

3. The reference to the Quadripartite Agreement which was contained in the statement referred to above is incomplete and therefore misleading. In this connection the Government of the United Kingdom of Great Britain and Northern Ireland wishes to draw attention to the fact that the provision of the Quadripartite Agreement referred to in the statement provides that 'the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it'.

4. The Government of the United Kingdom of Great Britain and Northern Ireland does not consider it necessary nor does it intend to comment on any incomplete and misleading references which may in future be made to provisions of the Quadripartite Agreement by States which are not signatories to that Agreement. This should not be taken to imply any change in the position of the Government in this matter. (Text provided by the Foreign and Commonwealth Office.)

The Governments of France, the United Kingdom and the United States of America addressed the following communication, dated 21 August 1979, to the Secretary-General of the United Nations:

We have the honour to refer to the notes from the Legal Counsel to the United Nations, Nos. C.N.94.1979.TREATIES-I of 10 May 1979, C.N.315.1978.TREATIES-IO of 16 January 1979, concerning the ratification by the Government of the Federal Republic of Germany, with declaration, of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973, and in particular to refer to paragraph 2 of each of those notes which reported communications made by the Governments of Czechoslovakia and the German Democratic Republic respectively, relating to the application of that Convention to the Western Sectors of Berlin.

With regard to the communications referred to above, our Governments reaffirm that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

The three Governments do not consider it necessary, nor do they intend to respond to any further communications on this subject from States which are not parties to the Quadripartite Agreement. This should not be taken to imply any change of the position of the three Governments in this matter. (Text provided by the Foreign and Commonwealth Office.)

The following public statements were made by the Embassies in Bonn of the United States of America, France and the United Kingdom:

28 June 1979

1. The Embassies in Bonn of the United States, France and the United Kingdom have noted the reports of a decision taken today by the Volkskammer of the GDR amending the GDR election law. They have noted also the statement carried by the official GDR press agency ADN that 'the Berlin population has the right to elect its deputies directly'.

2. This statement gives the impression that the German Democratic Republic

could by unilateral action change the status of Greater Berlin, in violation of the Quadripartite Agreement of September 3, 1971, which applies to the whole of Berlin. The practice of nomination by the Magistrat of East Berlin deputies to the Volkskammer is one of long standing and is part of the existing situation to which the QA refers. Neither actions nor statements by a third state can affect the rights and responsibilities of the four powers or the status of Greater Berlin, which remain unchanged.

3. In this connection the Governments of the United States, France and the United Kingdom, wish to recall the London declaration of May 9, 1977, which reads in part: 'The three powers recalled that the quadripartite rights and responsibilities and the corresponding wartime and post-war agreements and decisions were not affected. They reaffirmed that this status of the special area of Berlin could not be modified unilaterally. The three powers will continue to reject all attempts to put in question the rights and responsibilities which the United States, France, the United Kingdom and Soviet Union retain relating to Germany as a whole and to all four sectors of Berlin.'

4. The Governments of the United States, France, and the United Kingdom share with the Government of the Soviet Union the responsibility for maintaining the status of Greater Berlin, which can be altered only by agreement of all four powers. They will look to the Government of the Soviet Union to carry out its obligations regarding Berlin.

5. The three powers will raise this matter with the Soviet Union.

30 June and 1 July

1. The four Foreign Ministers of France, the United States, the United Kingdom and the Federal Republic of Germany have reviewed the development of the situation in Germany and particularly Berlin. They have noted with concern the reports of a decision of the Volkskammer of the GDR amending the GDR election law with the apparent intention of giving the East Berlin population the right in future to elect representatives to the Volkskammer directly. This would constitute a change in the previous practice of nomination of deputies by the Magistrat of East Berlin. The four ministers recall in this connection the London declaration on Berlin of 9 May 1977, which reads in part:-

'The three powers recalled that the Quadripartite Agreement was based explicitly on the fact that quadripartite rights and responsibilities and the corresponding wartime and post-war four-powers agreements and decisions were not affected. They reaffirmed that this status of the special area of Berlin could not be modified unilaterally. The three powers will continue to reject all attempts to put in question the rights and responsibilities which France, the United States, the United Kingdom and the Soviet Union retain relating to Germany as a whole and to all four sectors of Berlin.'

The Governments of the United States, France and the United Kingdom share with the Government of the Soviet Union the responsibility for maintaining the status of Greater Berlin. This can be altered only by agreement of all four powers. The three governments look to the Government of the Soviet Union to carry out its obligations regarding Berlin. At the same time the four Foreign Ministers emphasise the importance for detente, security and cooperation in Europe of the maintenance of an undisturbed situation in and around Berlin. (Texts provided by the Foreign and Commonwealth Office.)

The following communications on the subject of Berlin were addressed to the

President of the United Nations Conference on Restrictive Business Practices which met in Geneva in November 1979:

Letter dated 27 November 1979 from the Head of the delegation of the Union of Soviet Socialist Republics addressed to the President of the United Nations Conference on Restrictive Business Practices

I have the honour to draw your attention to the fact that, in the preliminary list of representatives of States to the United Nations Conference on Restrictive Business Practices, Mr. K. Stockmann, an official of the Federal Department for the Monitoring of Cartels of the Federal Republic of Germany, whose headquarters is illegally situated in West Berlin, is shown as a member of the delegation of the Federal Republic of Germany.

The nomination of an official of the Federal Department of the Federal Republic of Germany for the Monitoring of Cartels as a member of the delegation of the Federal Republic of Germany to the United Nations Conference on Restrictive Business Practices can only be regarded as an act aimed to misuse the authority of the United Nations for obtaining legal sanction for State institutions of the Federal Republic of Germany which are illegally located in Berlin (West). The presence of those institutions in Berlin (West) is in direct contradiction with the provision of the Quadripartite Agreement of 3 September 1971 that Berlin (West) is not a constituent part of the Federal Republic of Germany and continues not to be governed by it. Attempts to involve such institutions in international co-operation are bound to cause only unnecessary differences of opinion and complications, obstructing the fulfilment of the tasks facing the United Nations.

It follows from what has been stated above that the USSR delegation cannot recognize as legitimate the nomination of Mr. K. Stockmann as a member of the delegation of the Federal Republic of Germany.

I should be grateful for the circulation of this letter as an official document of the Conference. (TD/RBP/CONF/L.4.)

Letter dated 27 November 1979 from the Head of the delegation of the German Democratic Republic, addressed to the President of the United Nations Conference on Restrictive Business Practices

In connexion with the inclusion of Mr. Kurt Stockmann of the Bundeskartellamt, which has been illegally established in Berlin (West), in the delegation of the Federal Republic of Germany, the delegation of the German Democratic Republic feels prompted to state the following:

The nomination of a member of the Bundeskartellamt, a Federal institution of the Federal Republic of Germany, as member of the delegation of the Federal Republic of Germany to the United Nations Conference on Restrictive Business Practices can only be regarded as an act aimed to misuse the authority of the United Nations Organization for obtaining legal sanction for Federal Republic of Germany State bodies illegally located in Berlin (West). The fact that this institution was established in Berlin (West) is grossly contradictory to the Quadripartite Agreement of 3 September 1971, which states that Berlin (West) is not a constituent part of the Federal Republic of Germany and continues not to be governed by it. Attempts to involve such institutions in international co-operation are bound to cause unnecessary differences of opinion

and complications obstructing the fulfilment of the tasks facing the United Nations Organization.

It follows from what has been stated above that the delegation of the German Democratic Republic cannot recognize as legitimate the nomination of Mr. Kurt Stockmann as member of the delegation of the Federal Republic of Germany.

I request you, Mr. President, to circulate this statement as an official document of the Conference. (TD/RBP/CONF/L.5.)

Letter dated 29 November 1979, from the Representative of the United States of America, addressed to the President of the United Nations Conference on Restrictive Business Practices

On behalf of the delegations of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America, I should like to address you on the subject raised by the Head of the USSR delegation in his letter to you of 27 November 1979 (document TD/RBP/CONF/L.4).

The establishment of the Federal Cartel Office in the Western Sectors of Berlin was approved by the British, French and American authorities acting on the basis of their supreme authority. These authorities are satisfied that the Federal Cartel Office does not perform in the Western Sectors of Berlin acts in exercise of direct State authority over the Western Sectors of Berlin. Neither the location nor the activities of that office in the Western Sectors of Berlin, therefore, contravene any of the provisions of the Quadripartite Agreement.

The statement by the Soviet delegate contains an incomplete and consequently misleading reference to the Quadripartite Agreement. The relevant passage of that agreement to which the Soviet representative referred, provides that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that the sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

Furthermore there is nothing in the Quadripartite Agreement which supports the contention that residents of the Western Sectors of Berlin may not be included in the conferences; in fact annex 4 of the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany represents the interest of the Western Sectors of Berlin in international conferences and that Western Sectors of Berlin residents may participate jointly with participants from the Federal Republic of Germany in international exchanges. Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegation.

As far as the communication of the head of the delegation of the German Democratic Republic of 27 November 1979 laid down in document TD/RBP/CONF/L.5 is concerned, I would like to state that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

I respectfully request that this letter be circulated as an official document of the Conference. (TD/RBP/CONF/L. 6.)

Letter dated 29 November 1979, from the Acting Head of the delegation of the Federal Republic of Germany, addressed to the President of the United Nations Conference on Restrictive Business Practices

The Government of the Federal Republic of Germany shares the position set out by the delegation of the United States of America in its communication dated 29 November 1979.

It regrets the attempts of the Soviet Union and the German Democratic Republic to interfere with the insertion of Mr. Stockmann in the list of my country's delegation to the meeting. In conformity with fundamental rules and well-established practice of the United Nations and, accordingly, also of UNCTAD, it is, as a matter of principle, for every member country alone to decide which institutions or persons it wishes to involve in its contribution to the work of this organization. Consequently, there is no reason for denying the right of Mr. Stockmann to participate in this meeting as a member of my delegation.

It is my Government's view that the task of this meeting consists of promoting international co-operation in the economic field and not of discussing political matters which are beyond the scope of this organization. My delegation, therefore, regrets that co-operation within the framework of this meeting and also within UNCTAD as a whole is hampered by such politically motivated declarations and moves as I referred to above.

I should like to request that this letter be circulated as an official document of the conference. (TD/RBP/CONF/L.7.)

Letter dated 6 December 1979 from the Head of the delegation of the German Democratic Republic, addressed to the President of the United Nations Conference on Restrictive Business Practices

With regard to the remarks of the representative of the United States of America on document TD/RBP/CONF/L.5 contained in his letter of 29 November 1979, addressed to the President of the United Nations Conference on Restrictive Business Practices (document TD/RBP/CONF/L.6), I feel obliged to state the following:

The Quadripartite Agreement contains arrangements arrived at after the USSR Government had consulted and reached agreement thereon with the Government of the GDR. The German Democratic Republic, therefore, not only considers itself competent to comment upon the inclusion of a member of a Federal institution of the Federal Republic of Germany, which has been illegally established in Berlin (West), in the delegation of the Federal Republic of Germany to this conference, but it also expects the other side to honour the obligations it has assumed under the said Agreement.

I should like to request you that this letter be circulated as an official document of the conference. (TD/RBP/CONF/L.8.)

Letter dated 7 December 1979, from the Representative of the United States of America, addressed to the President of the United Nations Conference on Restrictive Business Practices

On behalf of the delegations of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America, I should like to address you on the subject raised by the Head of the delegation of the German Democratic Republic in his letter to you of December 6, 1979 (TD/RBP/CONF/L.8). I would like to reiterate that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

As I stated in my letter of November 29, 1979 (TD/RBP/CONF/L.6), the establishment of the Federal Cartel Office in the Western Sectors of Berlin was approved by the British, French and American authorities acting on the basis of their supreme authority. These authorities are satisfied that the Federal Cartel Office does not perform in the Western Sectors of Berlin acts in exercise of direct State authority

over the Western Sectors of Berlin. Neither the location nor the activities of that office in the Western Sectors of Berlin, therefore, contravene any of the provisions of the Quadripartite Agreement.

Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegation.

I respectfully request that this letter be circulated as an official document of the Conference. (TD/RBP/CONF/L.10.)

Part Eight: II. D. State territory and territorial jurisdiction—territorial jurisdiction—extra-territoriality

In reply to the question how many people were prosecuted in 1977 and 1978 for offences connected with offshore pirate radio stations under the Marine etc. Broadcasting (Offences) Act 1967, the Under-Secretary of State, Home Office, wrote:

During 1977, five people were prosecuted for offences under the Marine etc., Broadcasting (Offences) Act 1967. Three were convicted and fined sums ranging from £125 to £200. The case in which the other two are involved is not yet concluded. There were no prosecutions for offences under the Act in 1978. (*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 370: 30 March 1979.)

In reply to the question what representations have been made by the Government to the United States Government in the light of the United States grand jury decision to indict criminally seven transatlantic shipping groups, including Cunard, for alleged violations of United States anti-trust laws, and what reply has been given by the United States authorities, the Secretary of State for Trade, Mr. Nott, stated:

Her Majesty's Government have on a number of occasions made their concern at the indictments very clear to the United States Administration. We have in particular warned them that their action endangers future co-operation on anti-trust matters. (*Hansard*, H.C. Debs., vol. 969, col. 887: 2 July 1979.)

In the course of answering questions on the extradition of persons now residing in the Irish Republic, the Secretary of State for Northern Ireland, Mr. Atkins, stated:

Evidence gathered by the RUC concerning persons who are alleged to have committed terrorist offences in Northern Ireland, but who are now known to be in the Irish Republic, has recently been made available to the Garda. We hope this will enable the Garda to bring prosecutions under the extra-territorial criminal jurisdiction legislation, which allows terrorist suspects to be brought to trial in one jurisdiction for specified offences committed in the other after 1 June 1976.

It is solely for the responsible authorities in the Republic to determine whether charges should be brought, as would be the case in this country in similar circumstances. However I remind hon. Members that I agreed with Irish Ministers on 5 October on the importance of making further use of the extra-territorial legislation. (*Hansard*, H.C. Debs., vol. 972, cols. 610–11: 25 October 1979.)

In July 1979 the United States District Court for the Northern District of Illinois (Eastern Division) permitted the Government of the United Kingdom

to file an *amicus curiae* Brief in litigation between Westinghouse Electric Corporation as plaintiff and Rio Algom Limited and other defendants, including two which were British corporations with British shareholders and management, Rio Tinto-Zinc Corporation Limited and RTZ Services Ltd. Westinghouse instituted proceedings against the defendants for alleged breaches of United States anti-trust legislation in respect of uranium production, claiming triple damages as provided for by the legislation. In the course of its *Brief* the United Kingdom explained its interest as follows:

The British Government was not involved in the events that led to this lawsuit inasmuch as it played no role in the initiation of or conduct of the alleged uranium cartel. Uranium is not produced in the United Kingdom. Nonetheless, the British Government has a significant interest in and concern over this litigation. Because of the international ramifications of the disputes posed in this litigation, significant decisions made in its course are likely to have serious effects on international trade and investment well beyond the confines of the uranium industry. Moreover, uranium is itself of major importance to the British Government for energy and national defense purposes. Another reason why this proceeding concerns the British Government is that it invokes the extraterritorial application of U.S. antitrust law to activities carried on outside the United States by citizens of the United Kingdom. The British Government has consistently maintained that such assertions of jurisdiction are inconsistent with international law and unfairly subject British enterprises to the sharply conflicting demands and policies of different sovereign governments.

The specific issue before the Court which prompts this *amicus curiae* Brief is the possible imposition of damages, perhaps amounting to hundreds of millions or even billions of dollars, on the defaulting defendants, including two which are British corporations with British shareholders and management, Rio Tinto-Zinc Corporation Limited and RTZ Services Ltd., when there has been no trial on the merits with respect to the appearing defendants (the alleged co-conspirators). RTZ and its direct and indirect subsidiaries and affiliates are of major significance to the British economy, which is highly dependent on international trade. They have interests throughout the world in almost every major metal and fuel including aluminum, borax, coal, cobalt, copper, gold, iron ore, lead, manganese, nickel, oil, silver, tin, uranium, zinc, and others. They provide all of the United Kingdom's current supplies of uranium. Because RTZ accounts for much more than half of the U.K. owned mining industry's turnover, it is important to the British Government. RTZ's considerable technical and financial capabilities are themselves valuable assets to the United Kingdom's economy. If RTZ were to face severe financial difficulties, or even a significant reduction in its level of activity, this could have major adverse economic consequences for the United Kingdom. (*Amicus curiae* Brief of the Government of the United Kingdom, pp. 2-3 (footnotes deleted): United States District Court for the Northern District of Illinois (Eastern Division): *In re Uranium Antitrust Litigation; Westinghouse Electric Corporation v. Rio Algom Ltd. et al.*, 3 August 1979.)

The United Kingdom Brief continued:

Relevant International Legal Background

It has long been the policy of the British Government to co-operate with the United States Government and the United States courts in civil and commercial litigation

and in matters relating to the detection and adjudication of conduct which is deemed under the laws of both countries to be improper, including in the economic field: fraud, tax evasion, and smuggling, in relation to which no jurisdictional difficulties normally arise. Moreover, the British Government has consistently taken the position that British enterprises engaged in transnational business operations should comply with the laws and governmental policies of the countries in which they transact business. Unfortunately, the instant case falls within one of the few legal areas in which there is a significant disagreement between the British and U.S. views as to the appropriate legal standards.

The following brief recitation of the thirty-four year old disagreement between the U.S. Government and the British Government is not designed to persuade the Court either that the British Government's position as to this dispute is correct or that the Court should not apply U.S. legal precedents. However, it is submitted that the Court should take into account this central and longstanding international disagreement regarding fundamental legal principles in considering the conduct of the defaulting British defendants.

The basic point of disagreement is whether the following statement in the 1945 *Alcoa* case should be unilaterally applied by the United States to international anti-trust matters:

'[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.' [*United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945)]

The Brief then made reference to the United States cases of *Timberlane Lumber Co. v. Bank of America*, 549 F.2d. 597 (9th Circuit, 1976), and *Mannington Mills Inc. v. Congoleum Corporation*, 595 F.2d. 1287 (3rd Circuit, 1979):

Until the recent *Timberlane* and *Mannington Mills* cases, the U.S. courts accepted this statement, often referred to as the 'effects' or 'intended effects' test of subject matter jurisdiction, as correct. However, after these decisions it is clear that the 'effects' test as formulated in *Alcoa* is no longer to be accepted by U.S. courts as 'settled law'. In fact, the Assistant Attorney General in charge of the Justice Department's Antitrust Division stated in August 1978:

'The list of factors suggested [in *Timberlane*] suggests that parties and the Court must now give consideration to all of the factors that . . . have been argued so vigorously by the foreign parties in past controversies. . . . This new role for the district court is long overdue. . . .

It has long been the position of the British Government that, in the context of the application of the U.S. antitrust laws to conduct outside the United States by non-U.S. citizens, the 'effects' test is inconsistent with international law. This is so in relation to civil antitrust treble damage cases brought by private persons, as well as criminal or civil antitrust litigation instituted by the U.S. Government, since the former are to be deemed to be 'penal' actions for the purposes of international law.

One of the most succinct statements of the British Government's position is the following passage from the submission of that Government's then Attorney-General to the House of Lords in *In re Westinghouse Electric Corporation Uranium Contracts Litigation*:

'No authority supports the United States claim to exercise penal jurisdiction over the actions outside the United States of non-United States nationals or companies of another country's nationality.

'The application of the effects doctrine to found jurisdiction in penal matters is regarded by Her Majesty's Government as being particularly objectionable in the field of anti-trust legislation. (1) The formation of a cartel and other activities against which anti-trust legislation is directed are not universally recognized as unlawful. Offences in the anti-trust category are wholly different from such offences as piracy which are universally regarded as unlawful. (2) The assertion of extra-territorial jurisdiction in anti-trust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states. (3) The effects doctrine is particularly uncertain in operation when applied in the field of anti-trust legislation. As the United States courts have recognized, almost any limitation of competition effected between economic units acting outside the United States may have repercussions, direct or indirect, on the economic interests of the United States; so the potential application by United States legislation of the United States courts of the effects doctrine introduces some insecurity into the relations of corporate bodies carrying on business outside United States jurisdiction; this is highly undesirable. (4) The penal sanctions attaching to violations of United States anti-trust legislation include severe criminal penalties and penal damages. In this respect no valid distinction can be drawn between proceedings brought by the State and those brought by private individuals to enforce a monetary penalty.'

Since 1945 the British Government has stated this position in various communications to the U.S. Government. Moreover, the British courts, including Britain's highest judicial body, the House of Lords, have taken similar positions.

Because of this basic disagreement over the international legality of assertions in antitrust cases of jurisdiction based on the 'effects' test there have been well known disagreements over the proper scope of discovery requests and remedy orders issued by U.S. courts in international antitrust cases. The importance of these disagreements to the British Government was demonstrated in 1964 when the British Parliament passed the Shipping Contracts and Commercial Documents Act which authorizes a Minister of the British Government to order British citizens not to comply with requests from foreign countries if the Minister determines that the request 'would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom'. (Ibid., pp. 7-12 (footnotes deleted). The Attorney-General's submission in the case of *Rio Tinto Zinc Corporation and Others v. Westinghouse Electric Corporation* is set out in full in [1978] A.C. 547, 589-95, which was appended to the *amicus curiae* Brief.)

The United States District Court entered a default judgment against the foreign defendants and the matter was taken on appeal to the United States Court of Appeals for the Seventh Circuit. The United Kingdom Government was permitted to file an *amicus curiae* Brief before the Court, in which it raised the issues whether, in light of the international ramifications of the case, the District Court should have considered whether subject-matter jurisdiction existed and, further, whether the District Court should have refrained from entering the default judgment and from ordering a damage hearing against them before the

trial of the appearing defendants. In its Brief, the United Kingdom Government, having set out substantially the same passages as are printed above, continued:

In April, 1979 the British Government, pursuant to the Shipping Contracts and Commercial Documents Act, instructed the defaulting British companies not to produce documents located in the United Kingdom or to supply information compiled from such documents. The grounds for this action were that a requirement for the production of documents from the United Kingdom in penal proceedings relating to activities of non-U.S. persons outside the United States would involve an infringement of U.K. jurisdiction. These instructions, which are legally binding, were given on the basis of information available to the British Government to assert and protect U.K. jurisdiction over documents and information within the United Kingdom against the extraterritorial reach of the antitrust proceedings below. Even if the non-appearing U.K. defendants were to decide to appear in the proceedings below, although one of the reasons for the giving of the instructions, the non-presence of the defendants in the United States, would be affected, the British Government's objections to subject matter jurisdiction would remain until that question of jurisdiction had been satisfactorily considered and resolved.

The lower court's actions in this case, as well as other actions taken by the U.S. Government and U.S. courts, have led the British Government to consider proposing new legislation to Parliament to mitigate the effects in the United Kingdom of antitrust judgments. On September 14, 1979, the British Secretary of State for Trade addressed the British-American Chamber of Commerce at Los Angeles. During his speech he stated:

'We understand and respect your anti-trust laws. . . . Certainly we acknowledge their purpose—and I am speaking here, . . . as a member of a government which is determined to restore the primacy of competition and enterprise in the economy of the United Kingdom. But what is discouraged or illegal in one country may be legal or positively encouraged in another. And the so-called "effects" doctrine of US law is leading to many instances where United States authorities are seeking to exercise their regulatory or investigatory powers over individuals or companies situated and operating outside the United States in ways which appear thoroughly objectionable in the countries concerned.

'I shall be introducing new legislation designed to give better protection to British companies and individuals against attempts by any other country . . . to impose on them unilaterally their own domestic economic policies and regulations. One of the effects of these proposals, if Parliament approves them, will be that a range of US judgments, including those in anti-trust, will not be enforceable in the UK and we shall be able to exercise tighter control over the provision of information from the UK where US authorities seek it for the purposes of investigations carried out under US law. The economic interdependence of the Western nations, particularly the very large financial and business investment between the US and the UK, requires considerable sensitivity when it comes to the effects of one nation's actions on the other. It demonstrates the desirability of inter-government discussion rather than unilateral action to solve multilateral problems.'

Thus, it should be clear that the British Government has never waived its objections to assertions of extraterritorial subject matter and personal jurisdiction made pursuant

to the U.S. antitrust laws. This *amicus curiae* Brief is an attempt to explain the British Government's position directly to this Court. (*Amicus curiae* Brief of the Government of the United Kingdom, pp. 30-3 (footnotes deleted): United States Court of Appeals for the Seventh Circuit: *In re Uranium Antitrust Litigation; Rio Algom Corporation, et al. v. Westinghouse Electric Corporation*, 19 October 1979.)

In moving the second reading of the Protection of Trading Interests Bill in the House of Commons, the Secretary of State for Trade, Mr. John Nott, stated:

I am moving today the Second Reading of a Bill which deals with matters vital to the interests of the United Kingdom as an international trading nation. While I hope that it will command general support, I recognise that the Bill in some respects breaks fresh legal ground. I hope that I shall be able to persuade the House that it is justified.

... My objective in introducing this Bill is to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view the most objectionable method by which this is done is by the extra-territorial application of domestic law. In theory this is a general problem, since many countries have policies which, given the occasion and the inclination, they might seek to enforce on persons located, or engaged in activities, beyond the normal bounds of national jurisdiction as recognised in international law.

In effect, however, the practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have suddenly become belligerent or confrontational in regard to this most powerful and valued friend. This Bill is a response to a situation of a very particular nature which has been developing over several decades, and which in the past few years has become much more acute. It also emphasises that, in so far as the application or enforcement of any foreign law requires the active assistance or passive acquiescence of the United Kingdom, the overseas country in question must have regard to the trading interests of the United Kingdom.

... I have to say that the United States has shown a tendency in certain respects over the past three decades increasingly to try to mould the international economic and trading world in its own image. There are certain well-established and deeply held principles in United States economic thought and law which, no doubt from the best motives, the United States seeks to have observed by its trading partners elsewhere in the world. This attitude is shared by the United States legislature, its courts and its enforcement agencies, all of which have contributed to the situation to which we object. Pre-eminently this arises in the field of anti-trust, or competition, law, and accordingly much of my speech will be devoted to that subject. But, as I shall explain later, there are many other areas in which the United States seeks to impose its own law or concept of good practice on those who do business with it, and even on those who do not do so in any direct sense.

The basic anti-trust law is the Sherman Act, which was passed in 1890. The wording of the Act outlaws restraints of trade in very general terms.

In the first United States Supreme Court case in 1909 involving the extra-territorial reach of the United States anti-trust laws, the court spoke of the general and almost universal rule that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. It stated that all legislation is *prima facie* territorial, and that it would be an interference with the authority of another sovereign, and contrary to the comity of nations, for a nation to apply its own

laws to acts done outside its jurisdiction. This was a clear expression of the territorial principle of national jurisdiction which we in the United Kingdom still observe.

However, by 1945 the United States courts had changed the situation drastically. In a case involving a Canadian and five European aluminium producers who joined together to allocate the amount of aluminium to be produced, the United States alleged that there had been an effect on the price of aluminium in the United States of America. In giving judgment, the court stated that: 'any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends'. The court found the agreement between the non-United States companies, which was an action performed entirely outside the United States of America, to be illegal under the Sherman Act, and punishable according to the provisions of that law.

Since that time this so-called 'effects doctrine' has been applied and extended by the United States courts and regulatory agencies. Furthermore, in applying this doctrine the United States courts have paid comparatively little attention to the interests and policies of foreign Governments where these have been in conflict with those of the United States. Even if they had done so, it would, in my view, be fundamentally unsatisfactory for United States law unilaterally to pass judgment on economic problems which by their very nature are of concern to more than one country. The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extra-territorial effects doctrine has created uncertainty for international industry in this country and elsewhere. The views which I express on this subject are not held just by our Government; they are held and deeply felt in Canada, Australia, South Africa and other countries of the EEC.

. . . The second area in which difficulties arise is the powers possessed by many agencies in their execution of the duties laid on them by the United States Congress. Those powers may lead them on occasion to pursue inquiries or launch proceedings against persons, who, according to our view of international law, are outside the jurisdiction of the United States. Successive Governments have been obliged to intervene in such cases on behalf of our traders. These agencies include the Federal Trade Commission, the Securities and Exchange Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, and others.

The third objectionable practice on the part of the United States is that from time to time it treats foreign subsidiaries of United States companies, or even companies in which United States citizens hold a number of shares, though not enough to make the companies subsidiaries of United States companies, as being for that reason subject to United States jurisdiction. Such companies may be required to behave in certain ways, including providing information for the purposes of United States domestic regulatory agencies.

That means that in furtherance of a United States Government policy, which may or may not be shared by other countries, companies domiciled and operating outside the United States, under the laws of other countries, are required to take actions which can and do have a direct bearing on their commercial well-being and on the jobs of, for example, British citizens who work for them in this country. No British Government can accept that British jobs should be harmfully affected by such legislative actions of the United States Congress or enforcement actions of United States Government agencies.

. . . I have explained at length why we object to certain of the practices of the United States in the legal and economic field. I hope that I have made it clear that, while to the

casual observer it may not appear a matter of special importance that such and such a company is involved in a United States anti-trust inquiry, or is subject to investigation by some other agency of the United States Government, real issues of national interest are involved for us. The issues are not theoretical, or merely of interest to lawyers.

. . . Last June, a United States grand jury handed down criminal indictments against several shipping companies and individuals, including two consortia in which there is a substantial British element—Cunard and Bibby Lines—and two British nationals. The indictments alleged that the consortia had violated United States anti-trust legislation by establishing rates without the approval of the relevant United States regulatory authority, the Federal Maritime Commission. The Government reacted strongly against the handing down of these indictments, as did the previous Administration to the institution of the grand jury investigation itself. The policy of the British Government, along with that of all European Governments, has been to avoid detailed regulatory intervention in the commercial aspects of international shipping. We believe that to be the best way of achieving efficient and effective shipping services and protecting the interest of the consumer.

There is the important point, too, that shipping is an international business. Once one starts regulating other than on an agreed basis, many jurisdictional problems can arise. Our own restrictive practices legislation reflects the policy that I have described.

In reference to this case, a senior official of the United States Department of Justice recently recalled that fines of over \$6 million were imposed—the largest in the history of the Sherman Act. That was against our shipping companies. He continued that this upward trend was continuing and that, indeed, the anti-trust division may well be on its way to becoming a 'profit centre' for the Department of Justice. I think that we can draw our own conclusions from that attitude.

. . . The shipping companies decided to plead 'no contest' because of the great cost of litigation in cash and managerial time, and so the case against them was not proved in court. Nevertheless, the highest possible fines were still imposed. Those companies now also face the threat of further proceedings and more sizeable fines by the Federal Maritime Commission for effectively the same offences. On top of that, civil triple damage proceedings have been commenced against them in which the claims may be over \$1.5 billion in triple damage suits.

Such claims are no mere bogey. Some United States paper producers have recently paid \$500 million in fines and damages as a result of anti-trust proceedings. The consequences for the shipping companies are potentially financially crippling. No Government can stand by and allow a vital industry to be threatened in that way when we contest the very basis of the United States action.

In another triple damage anti-trust case currently going on in the United States of America, where total damages of up to \$6 billion are being claimed, yet another major United Kingdom company—Rio Tinto Zinc—is at risk. The background to the case is worth explaining.

In 1964, when the United States uranium mining industry was threatened by foreign imports, it was afforded long term protection by means of an effective United States Government ban on the import of uranium for use in United States reactors. At a stroke that denied to the non-United States producers about three-quarters of the world market for uranium. During the late 1960s and early 1970s, Westinghouse, which is the United States of America's biggest power engineering company, concluded a number of contracts relating to the construction of nuclear power stations in

which it agreed to supply future quantities of uranium but failed to take the precaution of buying forward to cover its commitments.

In the meantime, the uranium producers outside the United States of America had, with the positive encouragement of the Governments involved, taken some action to protect their markets outside the United States of America in the light of the United States ban and the generally depressed market conditions, which it aggravated.

Following a large and unexpected increase in the price of uranium after 1973, Westinghouse found itself in serious difficulties. In September 1975, it gave notice that its uranium supply contracts had become 'commercially impracticable'. It blamed the large oil price rise in 1973 and claimed that the cause was the 'actions of foreign uranium producing countries and companies that have significantly curtailed international uranium supplies'. This led to Westinghouse being sued by the public power utilities. The total amount of compensation claimed was about \$2 billion. Westinghouse took this figure as the basis for a triple damage anti-trust claim against the uranium producers. I note that Westinghouse had not included amongst the defendants, the French producers that were involved. I cannot regard that as an accident, in view of Westinghouse's interests in France.

The case is still going on, but nine of the foreign defendants, including RTZ, have not accepted that the United States court has jurisdiction and have not appeared. Westinghouse is trying to recover damages from those foreign companies even before a trial on the merits has been heard. That is not scheduled to take place until 1981.

The actions of the non-United States uranium producers reflected policies of the Governments of the uranium-producing countries involved and were a direct result of the earlier United States protectionist embargo. Even the United States Government, despite their general claims to extra-territorial jurisdiction, decided to take only the most modest proceedings against one United States company in this case.

Why, then, should a United States company be able to drag foreign companies, including one of our leading companies, before a United States court in order to obtain massive damages for activities by non-United States companies outside the United States at a time when they were even denied access to the United States market?

I could give further examples of how various regulatory agencies in the United States are attempting to extend their reach to companies located outside the United States of America. The SEC and the Commodity Futures Trading Commission are both making moves to extend the reach of their jurisdiction beyond the United States, and Congress has recently passed legislation dealing with rebating in the shipping industry, which is legal in Europe but outlawed by the Federal Maritime Commission. Penalties could involve port closure for particular shipping lines.

I must emphasise that we do not dispute the right of the United States or any other nation to pass and enforce what economic laws it likes to govern business operating fully in its own country. Our objection arises only at the point when a country attempts to achieve the maximum beneficial regulation of its own economic environment by ensuring that all those having any contact with it abide by its laws and legal principles.

In other words, there is an attempt to export economic policy and law to persons domiciled in countries that may have different legal systems and priorities, without recognising that those countries have the right to lay down the standards to be observed by those trading within their jurisdiction. (*Hansard*, H.C. Debs., vol. 973, cols. 1533-41: 15 November 1979.)

In reply to a question at this point on whether the United States anti-Arab

boycott legislation was an example of extra-territorial jurisdiction of which the Minister was complaining, Mr. Nott replied:

The answer to the question is 'Yes'. I consider that the United States anti-boycott legislation comes within the area that I am describing. I do not think that I need to go further. (Ibid., col. 1542.)

The Secretary of State for Trade continued:

. . . we have several decades of diplomatic representation on this subject behind us, as have most other Western countries. It is not just we who are offended by the extra-territorial jurisdiction claimed by the United States under the effects doctrine which came rather late into the Sherman Act proceedings.

Since the Government came to power, I have made diplomatic representations on the shipping case and the Government have been involved in the uranium case. The only aspect of the Bill that we have not debated in full with the United States authorities is clause 6 which involves the recovery of triple damage suits in this country.

Since we published the Bill, the United States ambassador has seen me and made certain representations and I have given him a response. Apart from that, the general underlying seriousness of the British Government's view towards triple damage suits and the extra-territorial reach of the United States has been a matter of diplomatic representations by successive Administrations over the years, but it has achieved nothing to speak of.

Voices are continually being raised in the United States against trends in that country. Last month Mr. George Ball, a former Under-Secretary of State and former permanent representative at the United Nations, who is well known to the House, said that during his years in the State Department he had encountered no set of problems that evoked greater frustration and exasperation from foreign Governments than the United States' occasionally excessive bureaucratic zeal in trying to extend its laws and regulations extra-territorially.

Mr. Ball pointed out that the United States would resent it deeply if other nations tried to impose their peculiar policies and prejudices on the USA. He concluded that, if the United States continued to try to extend its jurisdiction beyond its borders, the whole system of international comity could break down.

There are many other statements by United States lawyers and citizens before Senate committees that I could quote, but I have already gone on for too long and time forbids it.

Perhaps surprisingly, our proposals have received a remarkably good reception in the United States press. *The Washington Post* recently carried an editorial entitled 'Anti-trust: The New Imperialism'. It concluded: 'the Sherman Anti-trust Act is not a suitable instrument for the regulation of world trade. Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation'. There have been several useful articles on the subject in the United States, where there is a general body of support for non-United States feeling about the effects doctrine.

The law does not operate in a vacuum. It is not something only for debates on jurisprudence between academic lawyers. The law is there to defend the interests of citizens and it is essential that we look on the Bill as an attempt to deal with a problem which we have failed to deal with at diplomatic level over many years. It is a genuine

attempt to protect British economic interests, operating not necessarily even in the United States. (Ibid., cols. 1542-3.)

Mr. Nott then turned to clause 6 of the Bill which would enable United Kingdom citizens, United Kingdom corporations and other persons carrying on business in the United Kingdom to recover back sums paid under foreign judgments for multiple damages in excess of the compensation for the loss of the person in whose favour the judgment was given. He continued:

I admit that our approach in clause 6 is rather novel and will, no doubt, cause a fair amount of fluttering in the legal dovecotes. I hope that when the Bill goes to another place, senior and distinguished members of the legal profession will state their views.

I do not know why my predecessors have felt unable to take the action that I am proposing. I believe that the time has come to do so. There are two particularly prominent examples in the courts in the United States and it is appropriate to move forward in the way that I propose.

We already have powers under a 1964 Act to deal with certain aspects of the extra-territorial reach of United States laws, but that Act was passed in response to a specific and offensive instance of extra-territorial claim to jurisdiction by the United States in shipping matters. It proved useful in a number of cases in which we have been able to ensure that commercial documents in the United Kingdom have not been available in response to United States requirements, but we have found that in the light of recent developments in the United States, the 1964 Act is no longer adequate to protect our interests.

I should tell the House that we have received representations from the United States Government about a number of aspects of the Bill, particularly the extension of the powers to prevent the production of documents from outside the United States, the total non-enforcement of multiple damage judgments, and the rights of recovery conferred by clause 6. We are examining with care the points which they have raised with us on the publication of the Bill. (Ibid., col. 1544.)

Later in the same debate, the Under-Secretary of State for Trade, Mr. Tebbit, stated:

We cannot give the United States authorities a right to demand information from companies in the United Kingdom over which we say they have no jurisdiction. (Ibid., col. 1591.)

In a Note (No. 56) dated 9 November 1979, the Embassy of the United States of America presented to the Secretary of State for Foreign and Commonwealth Affairs its comments on the Protection of Trading Interests Bill. In particular the Embassy commented on clause 6 of the Bill:

We are seriously concerned by Clause 6, both in overall concept and in specific details. As far as we are aware, this provision has no precedent anywhere in the world. In our view, it raises serious questions under the very principles of international law and comity to which Her Majesty's Government is committed.

United States antitrust law reflects a public policy so important to the United States that violations carry criminal penalties. The private treble damage action is a crucial aspect of United States antitrust enforcement. It was adopted as a complement to governmental enforcement tools, in recognition of the limited resources available to

governmental agencies to investigate and take action against all violations of the law. It acts as a deterrent to illegal activity in the same manner as governmental enforcement, and provides an incentive to the victims to act as 'private attorneys-general'.

Interference with this mechanism would be as objectionable to us as interference with the imposition of criminal fines. Instead of simply making treble damage awards unenforceable in the United Kingdom, the Bill turns the shield into a sword to be used against a method of enforcement of an important United States public policy given effect by United States courts entering judgments under United States law which in many cases can be satisfied entirely from assets found in the United States.

The theory underlying Clause 6 is apparently that all multiple damage awards are impermissible under international law unless they fall within the narrow exceptions specified in Subsections (2) and (3) of Clause 6. Though the United States and the United Kingdom have taken differing approaches to the appropriate reach of national jurisdiction, Clause 6 could sometimes be used to thwart the exercise of jurisdiction acceptable under even the most conservative jurisdictional theories, and would do so even in circumstances where the United Kingdom has no interest in the transaction.

The benefits of Clause 6 are available to any 'person carrying on business in the United Kingdom', unless that person is an individual ordinarily resident in the United States or a corporation with a principal place of business in the United States, or unless that person did business through a United States branch and the judgment relates to activities exclusively carried on in the United States through the United States branch. We do not understand the theory under which non-United Kingdom corporations doing business in both the United Kingdom and the United States but having a principal place of business elsewhere should be entitled to have a United Kingdom court undo what a United States court has done. We also believe it is unrealistic to insist that a judgment relates to activities 'exclusively' undertaken within one state's territory. In today's highly integrated and mobile world, conspiracies in restraint of trade can be hatched and implemented wholly or partly outside of the territories involved. Clause 6 as drafted would deny the validity of a judgment directed at multistate conduct even where part of the conduct took place in the United States. This would make it possible to evade United States law by going outside the United States for part of a course of conduct begun in and adversely affecting the United States.

An example will make the problem clear. Assume that a French company has modest branch operations in both the United Kingdom and the United States. Assume further that officials of the United States branch conspired with its United States competitors to fix United States prices of their product and that one significant price-fixing meeting among the conspirators took place during a trade association meeting held in Jamaica. A United States purchaser uncovers the conspiracy and successfully collects treble damages under the United States antitrust laws.

We would trust that such an antitrust action would be of no concern to Her Majesty's Government, and indeed that even the most conservative international lawyers would not claim that the United States courts had acted improperly in entering the treble-damage judgment. Yet Clause 6 would appear to give the French company a cause of action in United Kingdom courts to recover two-thirds of the judgment obtained by the United States plaintiff, even though the United Kingdom had only the most remote contact with the dispute. This is because the French company would be 'a person carrying on business in the United Kingdom' and the United States proceeding was not 'concerned with activities exclusively carried on' in the United States.

Furthermore, in cases where the activities were indeed undertaken exclusively within United States territory, we do not see the relevance of whether the business was carried on through a United States branch or establishment. Thus this condition in Clause 6, Subsection (3) is clearly a superfluity, even under the most restrictive jurisdictional view.

Unlike Clauses 1, 2 and 4 of the Bill, Clause 6 does not leave any room for the Secretary of State or the court to examine the facts of the case and determine either that there is no significant United Kingdom interest in the transaction or that United States interests outweigh United Kingdom interests. Principles of international law and comity, which are applied by United States courts (and we assume by United Kingdom courts as well) in cases of transnational interest, require consideration of the facts of the case and a balancing of the respective national interests involved. Clause 6 denies the opportunity for this sort of case-by-case examination, and does not even include a procedure under which United States views could be taken into account.

We thus strongly urge that Clause 6 be deleted from the Bill. If some version of the concept is to be retained, the Clause would have to be significantly modified to avoid inevitable inconsistencies with the international legal principles which both our governments endorse. One possible modification would be to use the approach taken in other Clauses of the Bill, which permit but do not require the Secretary of State to certify the need for particular measures in light of all the circumstances. (Text provided by the Foreign and Commonwealth Office.)

The United Kingdom Government replied to the United States Note No.56 in a Note (No. 225) dated 27 November 1979 from the British Embassy, Washington, to the United States Department of State. In particular, the United Kingdom Note stated:

In relation to Clause 6, which would confer a right of recovery through the U.K. courts of the non-compensatory portion of multiple damage awards, the U.S. Ambassador's Note states that this provision raises serious questions under the very principles of international law and comity to which Her Majesty's Government is committed. Her Majesty's Government's main objections to the private treble damage action, which is, as the Note observes, a crucial aspect of U.S. Anti-Trust enforcement, are that it has been adopted as a complement to government enforcement, that it provides an incentive to private parties to act as 'private attorneys-General', that such a system of enforcement is inappropriate and in many respects objectionable in its application to international trade. Her Majesty's Government believe that two basically undesirable consequences follow from the enforcement of public law in this field by private remedies. First, the usual discretion of a public authority to enforce laws in a way which has regard to the interests of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature. Secondly, where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy.

Her Majesty's Government consider that there are further aspects of U.S. civil penal procedure under the Anti-Trust Acts which are questionable in their application to non-U.S. nationals engaged in international trade. A defendant does not have to be present in the U.S. for jurisdiction to be exercised by the courts of that country over him. In the defendant's absence the allegations contained in the plaintiff's pleadings are accepted, i.e. failure to appear in the U.S. court is treated as tantamount to an admission of guilt. Wide and prejudicial discovery procedures are enforced. The

potential penalties can be enormous and totally out of proportion to the alleged mischief, particularly where the activities concerned were entirely legal where they occurred.

Finally, and most important, the U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of anti-trust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.

For all these reasons, Her Majesty's Government have reluctantly reached the conclusion that a limited countervailing remedy should be provided to persons in the U.K. who have, while engaged in international trade, been penalised under laws of this kind.

The remedy in Clause 6 does not depend on the exercise of any Ministerial discretion, since the circumstances in which a general civil right should be available must be objectively determined. To confer a discretion for the sole purpose of creating a private right would be wrong in principle.

Her Majesty's Government consider that they have proposed to Parliament a measure which is appropriate, having regard to all the circumstances, and in tune with the U.K. view of international law. (Text provided by the Foreign and Commonwealth Office.)

During the debate on the third reading of the Bill in the House of Commons, the Secretary of State for Trade, Mr. John Nott, stated:

As I stated on Second Reading, our objective in introducing the Bill was to reinsert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. I explained that, in effect, the practices to which we have taken exception had arisen from the extra-territorial application of United States domestic law.

. . . We remain open to hear the remarks of experts in the United States on this provision. Other countries are certainly interested in this approach. I have already indicated that some would say that it goes too far. Others say . . . that it does not go far enough. However, I believe that it demonstrates to other countries that this Government intend to be vigorous in upholding the sovereign rights of this country's companies and persons where extra-territorial application applies to them. In cases where punitive damages are awarded against British citizens, we feel that we must also demonstrate our dislike of this practice, and we have done so in a symbolic sense in clause 6.

Time alone will show whether clause 6 should be amended, widened or narrowed. We shall have to see how this legislation develops. I believe that it has been a necessary strengthening of the protection of British companies and persons against the extra-territorial applications of the laws of other countries. Clause 6 is symbolic and I hope that in some circumstances it will be effective. (*Hansard*, H.C. Debs., vol. 976, cols. 1040-1: 20 December 1979.)

Part Eight: IV. *State territory and territorial jurisdiction—regime under the Antarctic Treaty*

(See also Part Eight: II. A. (United Kingdom replies to Argentine and Chilean reservations to Proceedings of World Administrative Radio Conference), *supra*.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Antarctic exploration and any interim arrangements in this regard are not matters under discussion at the United Nations Law of the Sea Conference; international arrangements covering Antarctic exploration are the subject of the Antarctic treaty. The United Kingdom is a party to this treaty and at the ninth consultative meeting it was recommended that Antarctic mineral exploration should be the subject of further consultation between the parties prior to consideration at the tenth consultative meeting. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 90: 19 February 1979.)

Part Nine : I. A. Seas, waterways—territorial sea—delimitation

In reply to the question what are the internationally recognized limits of Soviet territorial waters in the Arctic Ocean seas listed [the Barents Sea, the Kara Sea, the Laptev Sea, the East Siberian Sea, the Chukchi Sea], the Minister of State, Foreign and Commonwealth Office, wrote:

The Soviet Union claimed a territorial sea of 12 nautical miles in 1927. Following the restatement of that claim in domestic legislation in 1960, Her Majesty's Government reserved their position on its validity. We understand that other Governments have acted similarly. (*Hansard*, H.L. Debs., vol. 398, col. 966: 8 February 1979.)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

The territorial waters of the Falkland Islands and their dependencies are currently set at three miles measured from base lines. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 367: 23 February 1979.)

On 23 May 1979, Her Majesty the Queen ordered the promulgation of the Territorial Waters (Amendment) Order in Council 1979 which came into operation on 18 June 1979. The Order provides that it shall be published in the London Gazette, the Edinburgh Gazette and the Belfast Gazette, but it had not been so published by the end of 1979. The Order has appended to it the following note which describes its content and purpose:

EXPLANATORY NOTE

(*This Note is not part of the Order.*)

This Order amends the Schedule to the Territorial Waters Order in Council 1964 by redefining specified points between Cape Wrath and the Mull of Kintyre which are joined to form baselines from which the breadth of the territorial sea adjacent thereto is measured. The amendments make minor changes which have been shown to be necessary by new charts of the area.

Part Nine : I. B. 1. Seas, waterways—territorial sea—legal status—right of innocent passage

In reply to the question whether Her Majesty's Government would take

steps to arrange for oil tankers to avoid the Minch and pass west of the Hebrides, the Government spokesman in the House of Lords, Lord Trefgarne, stated:

Yes, my Lords; . . . However, the mandatory exclusion of tankers would not be consistent with the right of ships to innocent passage through our waters, and we are obliged to comply with the terms of the 1958 international convention on the subject. (*Hansard*, H.L. Debs., vol. 402, col. 72: 24 October 1979.)

Part Nine: I. B. 2. Seas, waterways—territorial sea—legal status—regime of merchant ships

In the course of a debate in the House of Lords on oil pollution north of Scotland, the Government spokesman, Lord Strabolgi, stated:

The noble Lord . . . asked about the extension of territorial limits. It is true that an extension of our territorial seas to 12 miles would allow us to prosecute foreign ships which subsequently call at our ports for deliberate discharges up to 12 miles from our coasts instead of up to three miles as at present. This is one of the factors being weighed by Ministers in their current consideration of the problem. (*Hansard*, H.L. Debs., vol. 399, col. 991: 19 March 1979.)

In reply to a question, the Government spokesman in the House of Lords wrote in part:

The carriage of radioactive substances in ships is subject to the provisions of the Merchant Shipping (Dangerous Goods) Rules 1978 which apply to British ships registered in the United Kingdom, and to other ships, while they are loading cargo and in certain other circumstances, at any port within the United Kingdom or within its territorial waters. It is a criminal offence for radioactive substances to be taken on board, or to be carried on any ship to which the rules apply, in contravention of the provisions of the rules. The Department of Trade is responsible for the enforcement of the rules. (*Hansard*, H.L. Debs., vol. 398, col. 1512: 15 February 1979.)

In reply to a question, the Under-Secretary of State, Department of Trade, wrote:

Under the Prevention of Oil Pollution Act 1971, the master or owner of any foreign vessel may be prosecuted in our courts for the unlawful discharge of oil into our territorial waters: we have no powers to prosecute foreign vessels for the discharge of oil outside our territorial waters. I have no doubt that the Liberian Government are well aware of our powers in this respect. (*Hansard*, H.C. Debs., vol. 970, Written Answers, col. 786: 19 July 1979.)

Part Nine: I. B. 5. Seas, waterways—territorial sea—legal status—bed and subsoil

(See Part Nine. VIII. (answer of 16 January 1979), *infra*.)

Part Nine: III. Seas, waterways—internal waters

In reply to the question what limits Her Majesty's Government recognized to Soviet internal waters in the Arctic Ocean seas listed [the Barents sea, the Kara

Sca, the Laptev Sea, the East Siberian Sea, the Chukchi Sea], the Minister of State, Foreign and Commonwealth Office, wrote:

Internal waters are those within the inner limits of the territorial sea, which are the low water line on the coast, or bay closing lines or straight baselines established in accordance with international law. In 1961 Her Majesty's Government reserved their position in respect of certain provisions in Soviet domestic legislation on the subject of bay closing lines and straight baselines; they are not aware of any specific subsequent action by the Soviet Government to establish territorial sea baselines in the sea areas mentioned which raise the question of recognition. (*Hansard*, H.L. Debs., vol. 398, col. 966: 8 February 1979.)

Part Nine : IV. *Seas, waterways—straits*

The following question was asked of Her Majesty's Government in the House of Lords:

Now that it is agreed, even by Warsaw Pact States, that the Soviet aircraft carrier 'Kiev' is an aircraft carrier, that other aircraft carriers are being built by the Soviet Union in the Black Sea, and that the Montreux Convention specifically forbids the passage of aircraft carriers through the straits from the Black Sea into the Mediterranean, what discussions the Government have held, or are proposing to hold, with other signatories of the Montreux Convention, and particularly with the Soviet Government, about its apparent intention to breach once again the conditions of one of the world's oldest arms control agreements.

In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government have had no recent discussions on the matter. It remains Her Majesty's Government's view that the passage of the 'Kiev' and similar ships through the straits is not compatible with the Montreux Convention. The Soviet authorities are aware of this view, which is also known to other signatories of the Convention. However, Her Majesty's Government's views are not shared by some of the other Governments concerned, in particular the Turkish Government. (*Hansard*, H.L. Debs., vol. 398, cols. 680-1: 6 February 1979.)

In reply to the question what straits in the Arctic Ocean seas listed [the Barents Sea, the Kara Sea, the Laptev Sea, the East Siberian Sea, the Chukchi Sea] did Her Majesty's Government consider to be international straits; and when did a British vessel last exercise the right of innocent passage through them, the Minister of State, Foreign and Commonwealth Office, wrote:

The relevant international instruments do not include or define the concept of international straits, but various international instruments lay down special rules for straits which are 'used for international navigation'. It has not yet been internationally determined which straits in the Arctic Ocean fall into this category. For the reasons given in my reply to the noble Lord's earlier Question, I am not in a position to give detailed information on the movements of British ships in the sea areas mentioned. The right of innocent passage applies to all areas of territorial waters whether in straits or elsewhere. (*Hansard*, H.L. Debs., vol. 398, col. 965: 8 February 1979.)

Part Nine : VII. A. 5. *Seas, waterways—the high seas—freedom of the high seas—other freedoms*

In reply to the question what was the position in international law of military and civil air bases established on ice on the high seas, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government are not aware of any bases which have been established on ice on the high seas for the purposes of general civilian or military aviation. Scientific research stations established on ice on the high seas are normally supplied by air and have landing facilities. The legal position of any such station while floating on the high seas is not clearly defined and would have to be established in relation to a specific issue by reference to any applicable treaties and the general rules of international law, notably the law of the high seas and possibly air law. (*Hansard*, H.L. Debs., vol. 398, col. 1239: 13 February 1979.)

Part Nine : VII. G. *Seas, waterways—the high seas—pollution*

In the course of a debate in the House of Lords on oil pollution north of the Scottish mainland, the Government spokesman, Lord Strabolgi, stated:

It is clear that the oil and the oiled seabirds on Orkney, Shetland and Caithness are the result of some tankers discharging illegally oily ballast water. Her Majesty's Government utterly condemn this filthy practice and I might add that the great majority of tanker captains and tanker companies who are concerned to behave properly and responsibly, wholeheartedly share this view—as I know does the general public.

I may remind your Lordships and those outside this House that this practice is prohibited by international law. Under the International Convention for the Prevention of Pollution of the Sea by Oil of 1954, as amended in 1969, ships may not discharge oil anywhere at sea unless the ship is moving and the instantaneous rate of discharge of oil content does not exceed 60 litres per mile. As an additional protection, oil tankers may not discharge oil from their cargo tanks within 50 miles of the nearest land and may not discharge on any ballast voyage a total of more than 1/15,000th of their cargo capacity. Discharges from other ships and from tanker bilges must be made as far from land as practicable: in addition, these discharges must have an oil content of less than 100 parts per million.

The International Convention for the Prevention of Pollution from Ships 1973 will further strengthen these standards by limiting the amount of oil that may be discharged by a new tanker on a ballast voyage to 1/30,000th of the cargo carried on the previous laden voyage. For other ships (and tanker bilges) the discharge will have to take place more than 12 miles from land—instead of 'as far as practicable' which was the wording previously.

The relevant United Kingdom legislation—the Prevention of Oil Pollution Act 1971—provides heavy penalties: a fine of up to £50,000 on the owner and/or the master on summary conviction and an unlimited fine when convicted on indictment. The Government therefore are taking this very seriously. This should be clearly understood by everyone. Given the proper evidence, the Department of Trade will prosecute and the courts, I am sure, will make full use of their powers. And in the case of foreign ships discharging outside our territorial waters, we shall bring this to the notice of the flag State concerned to take similar firm action.

We believe that the prime responsibility for enforcing international conventions should remain with flag States; only they can generally enforce standards on a particular ship consistently over a period of time. We accept an increasing role for the port State—that is, the State at whose port a ship calls—and recent IMCO Conventions include port State control provisions. We are doubtful about enforcement by the coastal State; that is, a state whose coasts a ship is passing. If this right means anything, it means a right to arrest a ship at sea, and that can lead only too easily to accidents, loss of life and pollution, particularly if action is taken by ill-equipped and impetuous régimes. (*Hansard*, H.L. Debs., vol. 399, cols. 988–92: 19 March 1979.)

In reply to a question, the Under-Secretary of State for Trade wrote in part: Our first objective is, as far as possible, to prevent oil pollution. Given the international character of shipping, this is best achieved by securing agreement on as wide a base as possible to high standards. This leads us to stress the importance of acting primarily through the Intergovernmental Maritime Consultative Organisation (IMCO) and the International Labour Organisation (ILO).

Once agreement has been reached in IMCO or the ILO, we are concerned that those standards should be brought into effect promptly. When enacted, the Merchant Shipping Bill will enable us to ratify and implement a number of conventions. We welcome the support given by Recommendation 847 of the Parliamentary Assembly of the Council of Europe for such action.

There is scope for regional co-ordination of research and co-operation in dealing with oil spills, and a firm basis for such action already exists under the (Bonn) agreement for co-operation in dealing with pollution of the North Sea by oil 1969. This can sometimes usefully be supplemented by joint contingency plans, such as Mancheplan, which we have drawn up with France, but resources for dealing with oil spills need to be fairly close at hand and the appropriate response depends very much on local circumstances. These considerations set a practical limit to the scope for multi-lateral co-operation.

Provided that agreement has been reached in IMCO or the ILO, there is also scope for regional arrangements intended to secure consistent and concerned port state enforcement, as a complement to flag state enforcement: that has led to our participation in the Hague memorandum of understanding. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 486: 5 March 1979.)

In reply to the question how many prosecutions had been made under the Dumping at Sea Act, the Lord Advocate replied that there had not been any (*Hansard*, H. C. Debs., vol. 964, Written Answers, col. 802: 23 March 1979).

In reply to a question, the Minister of State, Department of Employment, wrote:

The 1976 London Convention on Civil Liability for Oil Pollution Damage from Offshore Operations has been signed by the Governments of the United Kingdom, the Federal Republic of Germany, the Irish Republic, the Netherlands, Norway and Sweden. It will enter into force 90 days after four signatory countries have ratified or acceded to it. None has yet done so.

Her Majesty's Government have not yet decided whether to ratify the Convention. Meanwhile, in the event of oil pollution from offshore operations in the North Sea, those affected can claim under the Offshore Pollution Liability Agreement, a volun-

tary scheme established by the oil industry. (*Hansard*, H.L. Debs., vol. 400, cols. 1601–2: 27 June 1979.)

In reply to a question, the Under-Secretary of State, Department of Trade, wrote:

Under the Prevention of Oil Pollution Act 1971, the master or owner of any foreign vessel may be prosecuted in our courts for the unlawful discharge of oil into our territorial waters; we have no powers to prosecute foreign vessels for the discharge of oil outside our territorial waters. (*Hansard*, H.C. Debs., vol. 970, Written Answers, col. 786: 19 July 1979.)

In reply to a question, the Government Minister in the House of Lords wrote:

There are at present no international agreements in force, and no national legislation, regulating operational discharges from ships into the sea of chemicals other than oil, but in due course the International Convention for the Prevention of Pollution from Ships 1973 and the 1978 Protocol thereto will prohibit most such discharges within UK territorial waters. (*Hansard*, H.L. Debs., vol. 401, col. 2034: 25 July 1979.)

Part Nine : VIII. *Seas, waterways—continental shelf*

In reply to a question, the Government spokesman in the House of Lords wrote in part:

The search for and exploitation of offshore oil and gas resources is conducted under licences granted by the Secretary of State in accordance with regulations made under the Petroleum (Production) Act 1934 and the Continental Shelf Act 1964. The regulations specify the model clauses to be incorporated in all licences. These model clauses require that all operations be carried out in accordance with good oilfield practice, and that the licensee avoid interfering unjustifiably with navigation or fishing or the conservation of the living resources of the sea.

The National Coal Board, by virtue of the Coal Industry Nationalisation Act 1946, is charged with the duty of working and getting coal in Great Britain (including territorial waters). Rights exercisable by the United Kingdom outside territorial waters in the seabed and subsoil and their resources relating to coal were vested in the National Coal Board by the Continental Shelf Act 1964, and are exercisable by the Board subject to the consent of the Secretary of State.

The Continental Shelf Convention of 1959 [*sic*] declared that the coastal State exercises over its continental shelf sovereign rights for the purpose of exploring the shelf and exploiting its natural resources. In the case of the United Kingdom Continental Shelf, no one may explore it or exploit its resources without the express consent of Her Majesty's Government.

So far as other minerals within territorial waters and the United Kingdom Continental Shelf are concerned these in general form part of the Crown Estate and are under the management of the Crown Estate Commissioners who have professional and scientific advisers. Activities, licensed only after careful consideration of the possible impact on other interests, include the winning of tin, salt and potash, but by far the most important activity is the winning of marine sand and gravel from the sea for use as concrete aggregate or for reclamation. This activity comprises some 10% of the national production of that material. (*Hansard*, H.L. Debs., vol. 397, cols. 931–2: 16 January 1979.)

In reply to the question whether the Government regards the sovereignty over the continental shelf around the Falkland Islands as being British, without any sort of qualification, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

Yes, my Lords. (*Hansard*, H.L. Debs., vol. 398, col. 591: 6 February 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Under the Geneva Convention on the Continental Shelf and under general international law, the consent of the British Government is required to prospect for and extract oil from any area of the seabed which appertains to the Falkland Islands. Licences may be issued for these and similar purposes by the governor under local legislation within the 100 fathom line as defined by the Falkland Islands (Continental Shelf) Order in Council 1950. Consent was given last year to two United States survey companies to carry out a seismic survey around the Falkland Islands. No licences have been issued for the prospecting or extraction of oil. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 308: 23 February 1979.)

In the course of describing those aspects of the United Kingdom's energy policy currently being discussed with the E.E.C. Commission, the Secretary of State for Energy wrote:

Landing Requirement

All petroleum production licences for the UK Continental Shelf contain a provision that petroleum won and saved from the licensed area, other than that used at the field, shall be delivered on shore in the United Kingdom unless I give notice of my consent to delivery elsewhere. The Commission has questioned whether this requirement is compatible with the Treaty of Rome which requires that there should be free movement of goods in intra-Community trade, but the Government have pointed out that we see no reason to doubt the compatibility of the requirement with the Treaty. Discussions are continuing with the Commission to see whether we can convince them on this point having regard particularly to the waivers of the landing requirement which we have given and to the appreciable exports of oil which are taking place. (*Hansard*, H.C. Debs., vol. 963, Written Answers, col. 597: 5 March 1979.)

The following question was asked of Her Majesty's Government:

Whether it is their view that a 500 metre safety zone set up round an installation at sea may only be drawn from the edge of the installation on the surface of the sea, or whether they believe that it may equally be drawn from farther flung points of the installations below the water line or on the seabed, including, specifically, mooring cables.

The Government spokesman in the House of Lords wrote in reply:

Under the Convention on the Continental Shelf, the 500 metre safety zone may be measured from each point of the outer edge of an installation established for the exploration and exploitation of the natural resources of the Continental Shelf. This rule is not limited to those points of an installation which are on the water line. (*Hansard*, H.L. Debs., vol. 399, col. 354: 8 March 1979.)

The following additional question was later asked:

Whether it is their view that the mooring cables of an installation established for the exploration or exploitation of the natural resources of the Continental Shelf, or of its superjacent waters, are a part of that installation, and thus able to generate a 500 metre safety zone throughout their length.

The Government spokesman in the House of Lords wrote in reply:

I refer the noble Lord to the Answer I gave on 8th March (*Official Report*, col. 354). It is the view of Her Majesty's Government that, for the purpose of determining the configuration of safety zones, mooring cables can be regarded as part of an installation where this is justified by the particular circumstances of the installation in question. (*Hansard*, H.L. Debs., vol. 399, col. 1887: 3 April 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government consider that the definition of the breadth of the continental shelf should be based on the principle of international law that the coastal States enjoys sovereign rights over the exploration and exploitation of natural resources within the area of seabed which is the natural prolongation of the land territory. (*Hansard*, H.C. Debs., vol. 967, Written Answers, col. 91: 11 June 1979.)

Part Nine : IX. Seas, waterways—exclusive fishery zone

In reply to a question, the Minister of State, Department of Agriculture, Fisheries and Food, wrote:

In 1978 United Kingdom fishery protection vessels carried out 1,383 boardings of foreign vessels within United Kingdom fishery limits. Twenty-two skippers of foreign fishing vessels were convicted of offences against fishery regulations applying within United Kingdom fishing limits but none of the offences involved illegal fishing within United Kingdom territorial waters. (*Hansard*, H.C. Debs., vol. 962, Written Answers, col. 468: 13 February 1979.)

In reply to a question, the Under-Secretary of State, Scottish Office, wrote:

The Commission's proposed regulation on the control of fishing activities—R/107/78 as amended by R/3012/78—envisages that member States would be responsible for the inspection of fishing vessels within their ports and within waters subject to their sovereignty or jurisdiction. This accords with the Government's view, as stated in paragraph 57 of their observations on the Expenditure Committee's recent report on the fishing industry, that enforcement within national fishery limits should continue to be the responsibility of the coastal State. (*Hansard*, H.C. Debs., vol. 962, Written Answers, col. 618: 15 February 1979.)

In reply to a question on the current state of negotiations concerning fishing rights between the European Economic Community and third countries, the Minister of Agriculture, Fisheries and Food wrote:

A provisional agreement has been reached on reciprocal fisheries arrangements for 1979 with Norway, the Faroe Islands, Spain and Sweden, although these have yet to

be fully confirmed by the Council of Ministers. Quotas have also been established for fishing by member States' vessels in Canadian, United States and international waters in the North-West Atlantic. (*Hansard*, H.C. Debs., vol. 964, Written Answers, col. 255: 15 March 1979.)

In reply to a question, the Secretary of State, Department of Agriculture, Fisheries and Food, wrote:

United Kingdom fishery limits were not extended to 200 miles until 1 January 1977. In both 1977 and 1978, United Kingdom fishery protection forces made approximately 30,000 sightings of fishing vessels within those limits.

The following table shows for each year the number of boardings, of vessels brought in for further investigation and of subsequent convictions for offences against United Kingdom fisheries regulations:

	1977	1978
Boardings	1,851	1,787
Vessels brought in for further investigation	46	26
Of which convicted of offences against United Kingdom fisheries regulations	43	22

In 1977 skippers of a further 30 vessels and in 1978 skippers of a further 19 vessels were convicted of offences against United Kingdom fisheries regulations following boardings at sea, but without the vessels concerned being brought in for further investigation. (*Hansard*, H.C. Debs., vol. 964, Written Answers, cols. 543-4: 20 March 1979.)

In reply to the question which countries have been designated under section 2 (1) of the Fishery Limits Act 1976, and which countries have had their fishing boats excluded from British waters, the Secretary of State, Department of Agriculture, Fisheries and Food, wrote:

The countries whose vessels are currently designated to fish in areas within British fishery limits are as follows:

- (a) All EEC member States;
- (b) The following other countries:

The Faroe Islands	Spain
Norway	Sweden

Countries whose vessels have in the past fished in waters now within British fishery limits but which are not at present designated under section 2(1) of the Fishery Limits Act 1976 include the following:

Bulgaria	Iceland
Finland	Poland
German Democratic Republic (GDR)	Rumania
	USSR

Of these, Finland, the German Democratic Republic, Poland and the USSR were at one time designated under the 1976 Act. (*Hansard*, H.C. Debs., vol. 965, Written Answers, cols. 870-1: 4 April 1979.)

In the course of the second reading debate in the House of Commons on the Kiribati Bill, re-introduced after the change of Government, the Minister of State, Mr. Blaker, referred to the initialling of a draft treaty between the Gilbert Islands Government, the United Kingdom Government and the United States Government by which the latter would renounce its claims over certain disputed islands in the Phoenix and Line Island groups. He continued:

Until this new agreement was initialled, the Gilbert Islands fishery zone had excluded the Phoenix and Line Islands in view of the dispute, but the fishery limits were extended on 19 April to include the waters around the Phoenix and Line Islands. (*Hansard*, H.C. Debs., vol. 967, col. 1331: 24 May 1979.)

In reply to a question, the Minister of State, Department of Agriculture, Fisheries and Food, wrote:

The Community has reached agreement on fisheries arrangements for 1979 with Norway, the Faroe Islands, Spain and Sweden and quotas have been established for member States' fishing in Canadian, United States and international waters in the North-West Atlantic. Agreement has also been reached to allow access by member States' vessels to fisheries in the waters of Senegal. Negotiations for fishing rights in the waters of certain other African countries are continuing. (*Hansard*, H.C. Debs., vol. 969, Written Answers, cols. 265-6: 12 July 1979.)

In reply to a question, the Minister of State, Department of Agriculture, Fisheries and Food, stated:

... all waters, including the English Channel, lying within British fishery limits are regularly patrolled by our fishery protection fleet in order to ensure that all fishing vessels comply with United Kingdom laws on mesh sizes and related fishery conservation measures. (*Hansard*, H.L. Debs., vol. 402, col. 595: 5 November 1979.)

Part Nine : X. *Seas, waterways—exclusive economic zone*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government will support proposals designed to ensure that appropriate emphasis is given to median line principles for the delimitation of boundaries of economic and other maritime zones. (*Hansard*, H.C. Debs., vol. 967, Written Answers, col. 91: 11 June 1979.)

Part Nine : XI. *Seas, waterways—rivers*

In the course of a debate on 21 November 1979 in the Sixth Committee of the United Nations General Assembly on the Report of the International Law Commission, the United Kingdom representative, Mr. J. Freeland, observed:

On the topic of the Law of the Non-navigational Uses of International Watercourses, the Special Rapporteur, Mr Stephen Schwebel, produced a substantial first report which clearly gave the Commission much food for thought. We note with considerable interest the suggestion of an approach involving the drafting of a 'framework convention' to be supplemented by regional or bilateral 'user agreements'. If this approach

were to be followed, and a broad definition of the expression 'international watercourse' were adopted for the purposes of the 'framework convention', we would regard it as important that the maximum scope should be left to the states of a particular watercourse to solve by amicable agreement common problems concerning its uses. We welcome, in short, the concept of supplementary 'user agreements' providing for the establishment by the states concerned of detailed arrangements and obligations governing use. (Text provided by the Foreign and Commonwealth Office.)

Part Nine : XII. *Seas, waterways—bed of the sea beyond national jurisdiction*

In reply to the question whether it is the policy of Her Majesty's Government that international mining companies have an unrestricted right to exploit the mineral resources of the deep sea bed outside the limits of national jurisdiction, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

In the view of the United Kingdom Government, there is nothing in international or United Kingdom law to prevent companies from exploiting these resources, should no treaty governing the question enter into force. But it is the Government's aim to secure agreement on a Convention which would provide for states, public corporations and private companies, as well as the proposed international mining enterprise, to exploit the resources of the sea bed subject to clearly defined conditions. (*Hansard*, H.C. Debs., vol. 964, Written Answers, col. 495: 19 March 1979.)

In reply to a question, the Minister of State, Department of Industry, wrote in part:

In the context of the Law of the Sea Conference the Government's aim is to negotiate an international sea bed mining regime which, while sharing the benefits and the opportunity to participate among all States, will offer adequate incentives to British companies to undertake sea bed mining projects. (*Hansard*, H.C. Debs., vol. 964, Written Answers, col. 555: 20 March 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government consider that the constitution and powers of an international seabed authority should be such as to promote the mining of deep seabed minerals by States, public corporations and private companies, as well as the proposed international mining enterprise, subject to clearly defined conditions which would protect the interests of producers and consumers alike. (*Hansard*, H.C. Debs., vol. 967, Written Answers, col. 91: 11 June 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The main outstanding issue is that of the international seabed regime. Our position is that we are seeking to negotiate an internationally acceptable system for the exploitation of deep seabed minerals, which will give assured access to those resources to States, public corporations and private companies as well as the proposed international mining enterprise, thus allowing for orderly and effective exploitation. (*Hansard*, H.C. Debs., vol. 968, Written Answers, col. 412: 18 June 1979.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Interim deep seabed mining legislation is under consideration in the United States Congress. Legislation for this purpose also has been tabled by an all-party group in the West German Parliament. The question of introducing legislation on this subject in the United Kingdom is kept under review. (*Hansard*, H.C. Debs., vol. 974, Written Answers, col. 12: 19 November 1979.)

Part Ten : III. *Air space, outer space—outer space*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

My right hon. Friend has not had bilateral discussions with the United States authorities about the potential dangers arising from the uncontrolled re-entry of spacecraft into the earth's atmosphere. The question is being considered internationally on a multilateral basis within the United Nations outer space committee which has already been responsible for drawing up the following Treaties, all of which are now in force:

1. Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies.
2. Convention on registration of objects launched into outer space.
3. Convention on international liability for damage caused by space objects.
4. Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space.

(*Hansard*, H.C. Debs., vol. 965, Written Answers, col. 497: 2 April 1979.)

In the course of answering a question about the re-entry of the Skylab space station, the Prime Minister wrote:

The United States Government have accepted liability under the 1972 Convention on International Liability for damage caused by space objects. (*Hansard*, H.C. Debs., vol. 969, Written Answers, col. 1: 25 June 1979; see also H.C. Debs., vol. 970, Written Answers, col. 235: 11 July 1979.)

In the course of answering a question on the above topic, the Secretary of State for the Home Department wrote:

Any claim for compensation arising from Skylab's fall would be dealt with in accordance with the appropriate international convention, under which the launching state would be responsible for settling claims. (*Hansard*, H.C. Debs., vol. 969, Written Answers, col. 657: 5 July 1979.)

The following declaration was included in the Final Protocol dated 3 December 1979 to the Proceedings of the World Administrative Radio Conference held in Geneva:

For the Federal Republic of Germany, Australia, Austria, Belgium, Canada, Denmark, the United States of America, Finland, France, Greece, Ireland, Italy, Japan, the Principality of Liechtenstein, Luxembourg, Norway, New Zealand, Papua New Guinea,

the Kingdom of the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden, the Confederation of Switzerland:

The above-mentioned delegations, referring to the reservations made by the Republic of Colombia, the People's Republic of the Congo, the Republic of Ecuador, the Gabon Republic, the Republic of Kenya, the Republic of Uganda, the Somali Democratic Republic and the Republic of Zaire in statement No. 40 and by the Republic of Indonesia in statement No. 42, consider that, in as much as these statements refer to the Bogotà Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, the claims in question cannot be recognized by this Conference, and that the decisions of this Conference regarding the assignment and use of frequencies and orbital positions in the geostationary orbit are fully in accordance with the International Telecommunication Convention (Malaga-Torremolinos, 1973) by which this Conference is bound. (Text provided by the Foreign and Commonwealth Office.)

In December 1979 the United Kingdom Government submitted to the United Nations Committee on the Peaceful Uses of Outer Space a paper on the subject of nuclear power sources in outer space. This paper read in part as follows:

... 2. The United Kingdom welcomes the recommendation by the United Nations Committee on the Peaceful Uses of Outer Space that the Legal sub-committee should include in its agenda for the 19th session an item entitled 'Review of existing international law relevant to outer space activities with a view to determining the appropriateness of supplementing such law with provisions relating to the uses of nuclear power sources in outer space'.

3. In the view of the United Kingdom, there are a number of issues on which the Legal sub-committee should concentrate when it embarks upon substantive discussion of nuclear power sources in outer space. Of these the most important and urgent is:—

early warning. The elaboration of an obligation to give early warning of the malfunction of a nuclear power space craft will need to be studied. The working group on nuclear power sources have discussed the problem of orbital prediction. There are, however, a number of technical questions which call for elaborate study which may make it difficult to translate an early warning system into a definitive legal framework. None-the-less, in view of growing concern in the international community regarding the uncontrolled re-entry of space objects and particularly those where nuclear power sources may be involved, the Legal sub-committee should give this aspect its earliest consideration.

4. Priority over other questions needs also to be given to:—

prior notification. The existing outer space legal instruments will need to be developed to encompass the issue of prior notification of launch of a nuclear power space craft. For practical purposes, a UN General Assembly resolution might be considered in the short term, allowing for the subsequent elaboration of a more substantive instrument;

5. The UK believe that there are two further questions which the Legal sub-committee will also need to study:—

(a) *emergency assistance.* In this respect, the UK has indicated support for the Canadian suggestion that the sub-committee build upon Article 5 of the Agree-

ment on the Rescue of Astronauts and Article 21 of the Convention on International law for Damage Caused by Space Objects;

(b) *radiation exposure standards*. The UK supports as an interim measure, the working group on nuclear power sources' report for a study on the possible application of the recommendation of the International Commission on Radiological Protection.

(Text provided by the Foreign and Commonwealth Office.)

Part Ten: IV. Air space, outer space—telecommunications

(See Part Ten: III. (declaration of 3 December 1979), *supra*.)

Part Eleven: II. A. 1. Responsibility—responsible entities—States—elements of responsibility

(See also Part Ten: III., *supra* and Part Thirteen: II. A. (statement of 23 November 1979), *infra*.)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

Section 1 of the Southern Rhodesia Act 1965 declared that Southern Rhodesia continues to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction in respect of it. That provision determines the basis for Her Majesty's Government's actions. The continuing responsibility of the United Kingdom for Southern Rhodesia has been reaffirmed by the international community in the United Nations. (*Hansard*, H.L. Debs., vol. 401, col. 2140: 26 July 1979.)

At the 164th meeting in the seventh session of the Human Rights Committee of the International Covenant on Civil and Political Rights, held in Geneva on 7 August 1979, the United Kingdom representative, Mr. Watts, stated:

It was clear in principle that if there was a breach of an obligation in the Covenant by a dependent Territory the United Kingdom might be held internationally responsible for that breach. (CCPR/C/SR. 164, p. 11.)

In the course of a debate on 21 November 1979 in the Sixth Committee of the United Nations General Assembly on the Report of the International Law Commission, the United Kingdom representative, Mr. J. Freeland, referred to draft articles 28 and 29 of the Commission's work on State responsibility. He observed:

As regards the former, we welcome the Commission's conclusion, in paragraph 3 of the commentary, that states are not in principle internationally responsible for acts carried out in their territory by organs of other states. We consider, however, that it is worth drawing attention to the fact that there exist cases, neither of coercion nor of vicarious responsibility as envisaged in draft Article 28(1), where a state must be regarded as bearing responsibility for permitting the use of its territory for certain acts. I have in mind, Mr Chairman, cases such as those which were, as many members of this Committee will remember, exhaustively discussed in the course of the drafting of the Declaration on the Principles of Friendly Relations and Cooperation among

States in accordance with the Charter of the United Nations and also in the course of the drafting of the Definition of Aggression. I would add that any case in which international responsibility is to be attributed to one state on the basis of the actual conduct of another state must of necessity be approached with much caution. In adopting paragraph 3 of draft Article 28, the Commission recognized the need not to allow states to escape responsibility for what is basically their own conduct by claiming that they were acting under compulsion from elsewhere. It is, however, to be recalled that great care was taken in the preparation of the draft articles in Chapter II of the series on this topic to ensure that the conduct in question could properly be attributed to the state. So also, in this present case, great care must be taken to ensure that there in fact exists coercion or control which can properly be attributed to the second state as such. It must, we submit, be recognized that the definition of circumstances giving rise to vicarious responsibility under Article 28(1) is very wide, or at least that the expression 'subject to the power of direction or control' in that paragraph is very uncertain as to the degree of actual direction or control required. In our view, purely theoretical powers of direction which are not backed up by a genuinely effective means of control should not be considered sufficient to found vicarious international responsibility.

On draft Article 29, Mr Chairman, we would not take issue with the Commission's conclusion that circumstances such as consent given in advance deprive an act of wrongfulness rather than merely extinguish responsibility. But we think it evident that this, too, is a concept which requires to be approached with much caution if the possibility of abuse is to be avoided. The suggestion made in the commentary that the first element is that of *request* from the actor state is, we consider, one which imports that possibility. In addition, the approach adopted by the Commission on this question does not, we venture to think, fit well with cases of waiver of rights or acquiescence *ex post facto* (as in the Russian Indemnity Case which is cited in the commentary as an example of a case of 'consent precluding wrongfulness'). In our view an approach analogous to that adopted in Article 45 of the Vienna Convention on the Law of Treaties—that is, an approach predicated upon a 'loss of a right to invoke' would be a sounder one. (Text provided by the Foreign and Commonwealth Office.)

[For the terms of the draft articles referred to above, see *Report of the International Law Commission on the work of its 31st Session, General Assembly, Official Records, 34th Session, Supplement No. 10 (A/34/10)*, pp. 248, 292.]

In the course of oral questions on the subject of the mobilization of Zambian military forces, the Lord Privy Seal, Sir Ian Gilmour, was asked to make it clear that the British Government will not accept responsibility for paying compensation, as demanded by President Kaunda, for raids into Zambia by Rhodesian security forces. The Lord Privy Seal, in reply, stated:

Of course, we do not accept any responsibility for the damage caused by the Rhodesian raids. (*Hansard*, H.C. Debs., vol. 973, col. 386: 21 November 1979.)

In the course of a debate in the House of Commons on the Zimbabwe Bill, the Lord Privy Seal, Sir Ian Gilmour, stated:

... on independence the Parliament and Government of the United Kingdom will no longer have responsibility for Southern Rhodesia and [Clause 1] so provides. (*Hansard*, H.C. Debs., vol. 975, col. 1330: 12 December 1979.)

Part Eleven : II. A. 6. Responsibility—responsible entities—States—reparation

In a communication to the Secretary General of the Council of Europe dated 7 February, 1979, the Permanent Representative of the United Kingdom referred to the reservations made by Portugal on ratifying *inter alia* the Protocol of 20 March, 1952, to the Convention for the Protection of Human Rights and Fundamental Freedoms and, in particular, to Article 1 of the Protocol (*see* Treaty Series No. 105 (1978), Cmnd. 7502, p. 11) and stated that the Government of the United Kingdom wished to reaffirm its view that 'the general principles of international law require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property.' (Treaty Series No. 53 (1979) (Cmnd. 7624), p. 12.)

[Editorial note: The Government of the Portuguese Republic made the following reservation, dated 8 November 1978, to Article 1 of the Protocol:

Article 1 of the Protocol will be applied subject to Article 82 of the Constitution of the Portuguese Republic, which provides that expropriations of large landowners, big property owners and entrepreneurs or shareholders may be subject to no compensation under the conditions to be laid down by the law.

Article 82 of the Constitution reads as follows:

Article 82:

'1. The law shall determine the methods and forms of intervention, nationalisation and socialisation of the means of production and criteria for fixing compensation.

2. The law may stipulate that expropriations of large landowners, big property owners and entrepreneurs or shareholders shall not be subject to any compensation whatsoever.']

In reply to a question, the Lord Privy Seal wrote:

Detailed discussions between British Petroleum and the Nigerian Government on compensation for British Petroleum's assets nationalised by the federal military Government have not yet taken place. The amount of compensation payable, which is primarily a matter for British Petroleum and the Nigerian Government, has yet to be agreed. But Her Majesty's Government naturally expect prompt, adequate and effective compensation to be paid. (*Hansard*, H.C. Debs., vol. 973, Written Answers, col. 631: 14 November 1979.)

In reply to the question:

whether it is the policy of the Government to make the payment of their financial claims against the Albanian Government, directly or indirectly an obstacle to the return to Albania of the Bank of Albania's gold which was looted from Albania by Hitler.

the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government would like to bring this problem to a conclusion. Albanian compliance with the International Court of Justice's judgment of 1948 [*sic*] would certainly help in resolving it. There are, however, several problems which must be settled before the three Governments concerned can instruct the Tripartite Commission to deliver to Albania its share of the gold recovered after the last war. (*Hansard*, H.C. Debs., vol. 974, Written Answers, col. 584: 27 November 1979.)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

Claims amounting to approximately £5 million are outstanding against the Tanzanian Government in respect of the expropriated assets of British subjects. This figure does not include the Tanzanian assets of Lonrho which were taken over last year: the outcome of an independent audit of Lonrho's assets is still awaited. (*Hansard*, H.L. Debs., vol. 403, col. 564: 29 November 1979.)

Part Eleven: II. A. 7. (a). *Responsibility—responsible entities—States—procedure—diplomatic protection*

In reply to the question what action is being taken to obtain a settlement of British citizens' compensation claims against the Soviet Government, the Minister of State, Foreign and Commonwealth Office, wrote:

Negotiations over many years have so far proved unproductive since the Soviet authorities have insisted on parallel discussion of their counter-claims against the British Government. We have impressed on the Russians within the last month the need for progress. (*Hansard*, H.C. Debs., vol. 972, Written Answers, col. 266: 25 October 1979.)

In reply to the question what consultations had taken place between Her Majesty's Government and the President of Uganda regarding compensation for Asians expelled from Uganda in 1971, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The question of compensation has been raised with Ugandan Ministers on more than one occasion recently. They have undertaken to establish a Compensation Commission to deal with claims, and we understand that appropriate legislation is now being drafted. We hope the Commission will begin operations shortly. (*Hansard*, H.C. Debs., vol. 974, Written Answers, col. 481: 26 November 1979.)

Part Eleven: II. A. 7. (a). (i). *Responsibility—responsible entities—States—procedure—diplomatic protection—nationality of claims*

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

... many British citizens suffered loss of assets in Uganda under the Amin regime. The Government will, at an appropriate early moment, raise with the new Ugandan Government the question of outstanding claims by United Kingdom companies and nationals. (*Hansard*, H.C. Debs., vol. 967, Written Answers, col. 9: 18 May 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

A number of Ugandan Asians and representatives of community associations have sought Her Majesty's Government's support for their claims on the Ugandan Government. All United Kingdom citizens expelled from Uganda have been invited to record their losses at the Foreign and Commonwealth Office. Approximately 6,000—mostly Ugandan Asians—have done so. (*Hansard*, H.C. Debs., vol. 974, Written Answers, col. 481: 26 November 1979.)

Part Eleven : II. D. Responsibility—responsible entities—individuals

In reply to the question what is the policy of Her Majesty's Government in respect of paragraph 10 (i) of Council of Europe recommendation No. 855 on the statutory limitation of war crimes, in which member States are invited to sign and ratify the 1974 European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes, the Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

Assembly Recommendation 855 has been referred by the Council of Europe Committee of Ministers to the European Committee on Crime Problems for consideration, and Her Majesty's Government will not adopt a final view until the Committee of Ministers has made recommendations to the Governments of member States.

Her Majesty's Government have consistently supported the view that there should be no time limit on the initiation of legal proceedings or imposition of penalties with respect to war crimes and crimes against humanity. There is no such time limit in the United Kingdom. However, it is also the Government's view that the question of a statute of limitations or similar measures is an internal matter to be determined by individual Governments themselves, and in the last resort it is for individual Governments to decide whether to sign and ratify the European convention on the non-applicability of statutory limitation to crimes against humanity and war crimes. So far as the United Kingdom is concerned, Her Majesty's Government do not at present see any practical advantage in signing and ratifying the convention, though the matter will be kept under review. (*Hansard*, H.C. Debs., vol. 964, Written Answers, cols. 777-8: 23 March 1979.)

In the course of a debate in the House of Commons on the subject of the proposed repeal by the Federal Republic of Germany of the Statute of Limitations, the Under-Secretary of State, Foreign and Commonwealth Office, Mr. Luce, stated:

Her Majesty's Government believe that there should be no time limit on the initiation of legal proceedings or the imposition of punishment with respect to war crimes and crimes against humanity . . . We are also in no doubt that this is primarily an internal matter for the Federal German Republic. Responsibility for the prosecution of war crimes, and for any modifications to the Statute of Limitations, in the Federal Republic of Germany, lies clearly with the courts of the Federal Republic and with the Government. Therefore, I do not think that it would be appropriate or wise for Her Majesty's Government to raise this directly with the Federal authorities in Germany. (*Hansard*, H.C. Debs., vol. 967, col. 1020: 22 May 1979.)

Part Twelve : II. I. Pacific settlement of disputes—modes of settlement—settlement within international organizations

In reply to a question asking, *inter alia*, whether the Government would reconsider its decision not to bring before the Security Council the situation in Nicaragua, the Minister of State, Foreign and Commonwealth Office, wrote:

Since the Organisation of American States is seized of the issue, it would not be appropriate for the United Kingdom to take the issue to the United Nations Security

Council. (*Hansard*, H.C. Debs., vol. 969, Written Answers, col. 268: 28 June 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Government's policy is to encourage the parties to the Western Sahara conflict to reach a peaceful solution through the mediation of the Organisation of African Unity and on the basis of relevant United Nations resolutions. An ad hoc committee of the United Nations has recently visited the area and made recommendations. In common with a majority of Governments, the United Kingdom does not have formal contacts with the Polisario Front. (*Hansard*, H.C. Debs., vol. 969, Written Answers, cols. 590-1: 4 July 1979.)

Part Thirteen : I. Coercion and use of force short of war—unilateral acts

Speaking on 19 October 1979 in a debate in the Sixth Committee of the United Nations General Assembly on the subject of the report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-use of Force in International Relations, the United Kingdom representative, Mr. D. H. Anderson, stated:

The proposal for a world treaty on the non-use of force was put forward in 1976. On strictly legal grounds, the UK expressed serious doubts then about the value of such a treaty. We have maintained our doubts ever since. The work of the Special Committee in 1979 has, if anything, reinforced our doubts.

These doubts stem, first, from our understanding of the present law on the use of force. This is based on the Charter. Notably, Article 2(4) contains a prohibition on the use of force. It is one of seven Charter principles, which (as the distinguished representative of Brazil so rightly reminded us in his statement) are inter-related. Article 2(4) has to be read together with other provisions in the Charter, both substantive and adjectival. This prohibition on the use of force has been the subject of at least one Judgment by the International Court of Justice and has been the subject of analysis by learned commentators. Professor Brownlie's work was mentioned by the distinguished representative of Mexico the other day in his particularly cogent statement. I need not remind this audience of the treatise on the subject by Dr Bowett and the lectures given by Sir Humphrey Waldock to the Hague Academy some years ago. More recently, the relationship of the principle with the law of treaties was articulated in Article 52 of the Vienna Convention. In short, the law in this area is relatively well settled. There has been no general call for its codification or amendment. When problems have arisen from the actual use of force, legal uncertainties have not been a primary cause. A legal prohibition is not widened by further elaboration. Quite the contrary. There is a grave danger of reducing the width of a prohibition by adding words to it. This danger has not been totally avoided by the Soviet draft treaty. Moreover, a legal prohibition is not strengthened by its mere repetition.

A second area of concern is the possible effect of a new treaty on the law of the Charter and the law of treaties. A new treaty which obliged parties to abide by their undertakings contained in the Charter could cast doubt upon the binding nature of the Charter as a whole and its Article 103 in particular. It would also cast doubt on the rule *pacta sunt servanda* enshrined now in Article 26 of the Vienna Convention on the Law of Treaties.

The report of the Special Committee shows clearly that there exists no general will to have a treaty on the non-use of force. This debate has done the same. The Secretary-General's report on the rationalisation of our work emphasized the need to concentrate the limited resources of time, money and man-power on items on which worthwhile progress can be achieved. We have doubts whether the present exercise falls into that category. If, however, it is decided to renew the mandate of the Special Committee, discussion there should not be limited to a draft treaty on the non-use of force. The mandate of the Special Committee in resolution 33/96 includes the peaceful settlement of disputes and my delegation was one of those which presented the working paper on that subject. The mandate also includes discussion of recommendations. Our doubts on legal grounds about the idea of a treaty do not apply in the same way to recommendations. (Text provided by the Foreign and Commonwealth Office.)

In the course of a debate on 8 December 1979 in the Sixth Committee of the United Nations on the subject of the Report of an *ad hoc* Committee on the drafting of an international convention against the taking of hostages, the United Kingdom representative, Mr. D. H. Anderson, welcomed the progress made as reflected in the draft before the Sixth Committee. His statement continued:

That draft followed the structure of earlier conventions on related issues, in particular in that it contained the principle that Governments should either extradite or prosecute offenders.

2. His delegation hoped that the outstanding issues dealt with in articles 9 and 14 of the draft Convention could be resolved satisfactorily so that a consensus could be reached on the Convention as a whole and the latter adopted and opened for signature before the end of 1979. The adoption of such a convention would show that the international community disapproved of the taking of hostages and would intensify international co-operation to eliminate that particular form of terrorism. It also seemed that it might be possible to reach a consensus on a more general statement regarding terrorism as a whole at the current session of the General Assembly.

3. His delegation welcomed the establishment of a Working Group to consider the draft Convention in greater depth and find solutions to the outstanding issues. It believed that the preamble should be kept short and was generally satisfied with the other articles, several of which, particularly articles 12 and 13, were the result of compromises reached in the Working Group. Accordingly, his delegation believed that the Committee should proceed to consider, finalize and adopt the draft Convention. (A/C.6/34/SR.12, p. 2.)

Part Thirteen : I. D. *Coercion and use of force short of war—unilateral acts—intervention*

In the course of a debate on 2 November 1979 in the United Nations Security Council, the United Kingdom delegate, Sir Anthony Parsons, stated:

Recent South African raids inside Angola have caused the death of innocent people and the destruction of property, in clear violation of Angolan sovereignty. (S/PV. 2170, p. 47.)

In the course of a debate on 13 November 1979 in the United Nations

Security Council on the subject of the situation in Kampuchea, the United Kingdom delegate, Sir Anthony Parsons, stated:

Draft resolution L.7 on the other hand is wholly negative. It offers the people of Kampuchea neither practical help nor political prospects. Its devious purpose would appear to be to sabotage any attempt by the international community to take effective action in support of Kampuchea, a small member state which has been invaded by a powerful neighbour in violation of Article 2 (4) of the Charter. It is imperative for all of us to uphold the principle of the inadmissibility of the threat or use of force against the territorial integrity or political independence of any state; otherwise the aggressors will take comfort, and peace in South-East Asia and beyond will be at risk. It is clear, therefore, that draft resolution L.13, which seeks to restore Cambodian territorial integrity and political independence, should be supported, and that draft resolution L.7 which attempts to whitewash aggression should be opposed. (Text provided by the Foreign and Commonwealth Office.)

In the course of a debate on the subject of Cambodia, the Lord Privy Seal, Sir Ian Gilmour, stated:

I do not condone the Vietnamese invasion. The Vietnamese invaded not as liberators, but as occupiers, in flagrant contravention of the Charter of the United Nations. (*Hansard*, H.C. Debs., vol. 975, col. 719: 6 December 1979.)

On 28 December 1979, the Foreign and Commonwealth Office issued the following press statement with regard to Soviet military action in Afghanistan:

The British Government condemn the Soviet Union's military intervention. We believe that the people of Afghanistan have a right to choose their own Government without outside interference. (Text provided by the Foreign and Commonwealth Office.)

Part Thirteen : II. A. Coercion and use of force short of war—collective measures—regime of the United Nations

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

To date 35 prosecutions for breaches of Rhodesia sanctions have been completed; and three cases are at present before the courts. The penalties imposed include a two-year conditional discharge in one case, a suspended sentence of 12 months imprisonment plus a fine in another, and fines in the remainder of successful cases. Four cases ended in acquittal. (*Hansard*, H.C. Debs., vol. 960, Written Answers, col. 813: 17 January 1979.)

The following question was asked in the House of Lords:

To ask Her Majesty's Government wherein lies 'the existence of any threat to the peace, breach of the peace, or act of aggression' such as to justify the maintenance of sanctions against Rhodesia under the United Nations Charter; and precisely what action the Government of Rhodesia is now required to take in order to remove such threat, breach or act of aggression as the case may be.

In reply, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

... the threat to the peace derives from the rebellion by the régime. The 'internal settlement' has not terminated the state of rebellion and the conflict has escalated. As my noble and learned friend on the Woolsack said on 9th November last year, we are bound in international law to maintain sanctions until there is a return to legality. (*Hansard*, H.L. Debs., vol. 398, col. 4: 30 January 1979.)

The Secretary of State for Foreign and Commonwealth Affairs was asked whether Her Majesty's Government had held consultations with the Rhodesian regime with regard to obtaining the release of the assets of United Kingdom citizens, not resident in Rhodesia, held in that country; and if he would be prepared if necessary to agree to a similar release of funds belonging to Rhodesian citizens currently frozen in Rhodesia. In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

No consultations have been held with the Rhodesian regime on this matter. The right hon. Member's proposal would involve the release of funds blocked in Rhodesia which might then be employed, more profitably, for the benefit of the Rhodesian economy. This would be a breach of United Nations mandatory sanctions. (*Hansard*, H.C. Debs., vol. 962, Written Answers, cols. 18-19: 5 February 1979.)

In reply to the question asking that confirmation be given that sanctions can be imposed only as a result of action taken under Chapter 7 of the Charter, involving the agreement of all permanent members of the Security Council, the Minister of State, Foreign and Commonwealth Office, Lord Goronwy-Roberts, stated:

Yes, my Lords, the noble Lord, Lord Gladwyn, is absolutely right. Sanctions can be imposed only as a result of action taken under Chapter 7, and it would have to be international action taken at the instigation of and with the authority of the United Nations. (*Hansard*, H.L. Debs., vol. 398, col. 1393: 15 February 1979.)

In the course of a debate on United Nations peacekeeping activities, the Under-Secretary of State, Foreign and Commonwealth Office, Mr. Luard, stated:

As many hon. Members know, there is a provision for peacekeeping in the United Nations charter. When the charter was formulated, when the United Nations was founded, hope was placed in a still more ambitious concept—the idea of enforcement action by armed force in order to keep the peace. There are certain articles of the charter—articles 42 to 50—which set out the way in which it was hoped that this might be done through the creation of a permanent force which would operate under the authority of the Security Council.

Unfortunately, that never came into being. Negotiations took place for the formation of such a force, but they rapidly broke down over questions such as the size of the force, the size of contributions by individual members, the location of the force and so on. By 1947, those negotiations had been abandoned.

Not long afterwards, in 1950, the Korean war broke out. That was the first occasion on which one might say that a form of United Nations force was established, although it was not a peacekeeping force within the meaning of that term today. That was enforcement action, and only a small proportion of the membership of the United Nations contributed to the UN force in Korea. A large proportion of the then small

membership of the UN at that time had no wish to contribute in that way. (*Hansard*, H.C. Debs., vol. 964, cols. 849-50: 15 March 1979.)

In the course of a debate in the House of Commons on the subject of trade with South Africa, the Minister of State, Department of Trade, Mr. C. Parkinson, stated:

In November 1977 the United Nations Security Council imposed a mandatory embargo on arms and military and paramilitary equipment to South Africa. That Security Council resolution has been fully implemented by Her Majesty's Government. (*Hansard*, H.C. Debs., vol. 967, col. 1387: 25 May 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We shall continue to fulfil the obligations of the United Kingdom as regards the arms embargo against South Africa under Security Council resolution 418 in accordance with our existing legislation. (*Hansard*, H.C. Debs., vol. 968, Written Answers, col. 412: 18 June 1979.)

In reply to a question, the Attorney-General wrote:

Proceedings for the breach of the Rhodesian sanctions orders have been instituted since 1968 against 21 companies and 17 individuals. Twenty-six of these 38 cases have resulted in the conviction of 16 companies and 10 individuals; five companies and seven individuals have been acquitted and proceedings against three individuals are still pending. It would not be appropriate for me to list the names of those convicted, particularly as a number of convictions have already become spent under the Rehabilitation of Offenders Act. (*Hansard*, H.C. Debs., vol. 969, Written Answers, cols. 33-4: 25 June 1979.)

In reply to an oral question, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated:

... resolutions calling for sanctions against Rhodesia have been supported by virtually all members of the United Nations General Assembly. Breaches of sanctions have been established only in cases where governments have mounted successful prosecutions. We have drawn attention in the United Nations Sanctions Committee to a large number of cases in which sanctions are believed to have been breached by individuals or companies in other countries, and by institutions in the State-trading countries. ... it is not of course for us to take action against those who break sanctions; it is for the countries themselves. ... we have on various occasions named Bulgaria, Czechoslovakia, the German Democratic Republic, Romania and the Soviet Union on the grounds that we had information meriting further investigation and the breaches of sanctions had been committed by institutions in those countries, but the allegations were denied or ignored by the governments of those countries concerned. (*Hansard*, H.L. Debs., vol. 401, cols. 651-2: 9 July 1979.)

At its 2171st Meeting, held on 23 November 1979, the United Nations Security Council adopted Resolution 455 (1979) by consensus. Paragraph 5 of the Resolution, which concerned Southern Rhodesia, called for 'the payment of full and adequate compensation to the Republic of Zambia by the responsible

authorities for the damage to life and property resulting from the acts of aggression' committed by the 'illegal racist minority régime in Southern Rhodesia'. Following the adoption of the Resolution, the United Kingdom Permanent Representative to the United Nations, Sir Anthony Parsons, stated:

In our view the wording of this consensus does not imply that a fresh determination has been made under Article 39 of the Charter. Moreover, as regards operative paragraph 5 of the consensus, I repeat what my Lord Privy Seal, Sir Ian Gilmour, stated in the House of Commons on 21 November—namely, that 'the British Government do not accept any responsibility for the damage inflicted in Zambia by the Rhodesian raids, nor for the payment of compensation'. (S/PV. 2171, p. 42; see Part Eleven: II. A. 6., *supra*.)

In reply to the question asking what were the circumstances under which it was agreed that resolutions under Articles 39 and 41 of the United Nations Charter should be binding on the United Kingdom, the Minister of State, Foreign and Commonwealth Office, wrote:

On 23 August 1945, this House approved the ratification of the United Nations Charter, which had been signed by the United Kingdom at San Francisco on 26 June that year. Article 25 of the charter provides that members agree to accept and carry out the decisions of the Security Council in accordance with the charter. Both articles 39 and 41 of the charter provide for the Security Council to take decisions, once it has determined the existence of a threat to the peace, breach of the peace or act of aggression, and such decisions are generally accepted as being decisions to which article 25 applies. (*Hansard*, H.C. Debs., vol. 974, Written Answers, cols. 870–1: 30 November 1979.)

In reply to the question:

if it is in accord with British international obligations under the 1976 United Nations embargo on military contacts with South Africa for a British company, based at Hurn airport, to recruit technicians for the maintenance of South African Air Force aeroplanes at Dunnotar; and if he will make a statement.

the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have no knowledge of the alleged activities to which the hon. Member refers. As he describes them, they do not contravene the 1977 United Nations mandatory arms embargo against South Africa or the Government's policy of non-collaboration with the South African Government in defence matters. (*Hansard*, H.C. Debs., vol. 975, Written Answers, col. 314: 6 December 1979.)

The following letter, dated 12 December 1979, was sent by the Permanent Representative of the United Kingdom to the United Nations, Sir Anthony Parsons, to the President of the United Nations Security Council:

I have the honour, on instructions from Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, to inform Your Excellency that the Southern Rhodesia Constitution (Interim Provisions) Order 1979, providing for the assumption of full legislative and executive authority over Southern Rhodesia by a British Governor, was made on 3 December 1979. The Governor has assumed his functions in Salisbury today and his authority has been accepted by the commanders of the military

and police forces and the leading civil authorities there. Accordingly, the state of rebellion in the territory has been brought to an end.

The action which has been taken to restore Rhodesia to legality is action undertaken in the exercise of the responsibility as administering Power which the Security Council has repeatedly acknowledged as falling uniquely upon the United Kingdom. It will enable the final arrangements for the implementation of a cease-fire to be put into effect. These arrangements are being worked out in the final stage of the Constitutional Conference at Lancaster House, which was preceded by a long period of consultation. Members of the Security Council will be aware of the importance in this preliminary process of the Commonwealth Heads of Government Meeting in Lusaka in August. The Security Council was informed of the results of the Meeting in the letter from the Permanent Representative of Zambia to the Secretary-General dated 24 August 1979 (S/13515). In accordance with the undertakings given by the United Kingdom Government in Lusaka, all the parties to the conflict were invited by the United Kingdom Government to attend a constitutional conference in London. After three months of negotiation, agreement has been reached on an Independence Constitution providing for genuine majority rule. This Constitution was enacted by Order in Council on 6 December. Agreement has also been reached on the arrangements for the transitional period, including the holding of elections supervised under the United Kingdom's authority, and on the United Kingdom Government's cease-fire proposals. Throughout this process, the United Kingdom Government has been in close touch with the Governments of the front-line States and other Governments closely concerned.

The situation which was determined by the Security Council in its resolution 232 (1966) of 16 December 1966 to constitute a threat to international peace and security, as reaffirmed by subsequent resolutions of the Council, has accordingly been remedied and the purpose of the measures which were decided upon by the Council on the basis of that determination has been achieved. In these circumstances, the obligations of Member States under Article 25 of the Charter in relation to those measures are, in the view of the Government of the United Kingdom, to be regarded as having been discharged. This being so, the United Kingdom is terminating the measures which were taken by it pursuant to the decisions adopted by the Council in regard to the then situation of illegality. (S/13688.)

In the course of a debate on the Zimbabwe Bill, the Under-Secretary of State, Foreign and Commonwealth Office, Mr. R. Luce, stated:

Successive Labour and Conservative Governments have made clear that the imposition of sanctions depended on whether or not legality existed in Rhodesia. As we have now proceeded to legality as from today there is no justification, in our view, for the continuation of sanctions. Against that background, our permanent representative at the United Nations has informed the President of the Security Council that we are lifting sanctions from today. (*Hansard*, H.C. Debs., vol. 975, cols. 1411-12: 12 December 1979.)

Speaking during the 2181st Meeting of the United Nations Security Council, dated 21 December 1979, after the Council had adopted Resolution 460, the United Kingdom Permanent Representative to the United Nations, Sir Anthony Parsons, stated:

I begin with some brief comments on details of the resolution just adopted.

Operative paragraph 2 calls upon States to terminate sanctions against Southern Rhodesia. Our view remains, that the obligation to impose those sanctions fell away automatically with the return to legality of the colony. But we have been very conscious that many countries have attached great importance to the adoption by the Security Council of a resolution on this subject. We have been glad, in a spirit of co-operation, to support a resolution acknowledging that sanctions have fulfilled their purpose. (S/PV. 2181, p. 11.)

Part Fourteen : I. B. 10. *Armed conflicts—international war—the laws of war—nuclear, bacteriological and chemical weapons*

The following question was asked in the House of Lords:

Whether [Her Majesty's Government] will set out the names and effect of the treaties relating to chemical and biological weapons by which the United Kingdom, USA, USSR, and the GDR respectively are bound.

In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

These states are parties to the two major treaties relating to chemical and biological weapons: the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare (Cmd. 3604) and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Cmnd. 6397). The effect of the 1925 Protocol is to prohibit in war the first use between parties of both chemical and biological weapons. The effect of the 1972 Convention is correctly described by its title. (*Hansard*, H.L. Debs., vol. 399, col. 169: 6 March 1979.)

In reply to a question, the Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We are committed to pursue negotiations in good faith on effective and verifiable measures relating to the cessation of the nuclear arms race. We are negotiating a comprehensive test ban treaty which will curb the qualitative improvement in nuclear weapons. We are prepared to look carefully at other positive ideas. We await clarification particularly on how the latest Soviet proposals would be verified. (*Hansard*, H.C. Debs., vol. 964, Written Answers, cols. 596–7: 21 March 1979.)

APPENDICES

I. MULTILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1979¹

<i>Title</i>	<i>Place and date</i>	<i>Signatures</i>	<i>Treaty Series</i>
European Agreement on the Exchange of Tissue-Typing Reagents (Council of Europe No. 84). Entered into force 23 April 1977	Strasbourg, 17 September 1974	U.K. signature 8 February 1979 (ratification not required). Also signed and ratified by numerous other European States	51 (1979) (Cmnd. 7558)
Protocol to the above Convention (Council of Europe No. 89). Entered into force 23 April 1977	Strasbourg, 24 June 1976	U.K. signature 8 February 1979 (ratification not required). Also signed and ratified by numerous other European States	51 (1979) (Cmnd. 7558)
1979 Protocol for the Fifth Extension of the Wheat Trade Convention 1971. The Protocol entered into force on 23 June 1979 with respect to all provisions of the Convention other than Articles 3 to 9 inclusive and Article 21, and on 1 July 1979 with respect to Articles 3 to 9 inclusive and Article 21 of the Convention	Washington, 25 April 1979	U.K. declaration of provisional application deposited 22 June 1979 includes Guernsey, Isle of Man, St. Vincent, Belize, Bermuda, British Virgin Islands, Gibraltar, Hong Kong, Montserrat and St. Helena and Dependencies. U.K. is to accede in respect of the U.K. and the same territories. Many other States have signed and/or provisionally applied, ratified or acceded to the Protocol	Text: Miscellaneous, No. 16 (1979) (Cmnd. 7593)
1979 Protocol for the Fifth Extension of the Food Aid Convention 1971. The Protocol entered into force on 23 June 1979 with respect to all provisions other than Article II of the Convention and Article III of the Protocol and on 1 July 1979 with respect to Article II of the Convention and Article III of the Protocol	Washington, 25 April 1979	U.K. declaration of provisional application deposited 22 June 1979 excludes territories. U.K. is also to accede. Many other States have signed and/or provisionally applied, ratified or acceded to the Protocol	Text: Miscellaneous, No. 16 (1979) (Cmnd. 7593)

¹ Table supplied by the Foreign and Commonwealth Office.

<i>Title</i>	<i>Place and date</i>	<i>Signatures</i>	<i>Treaty Series</i>
European Convention for the Protection of Animals for Slaughter (Council of Europe No. 102) (Not in force)	Strasbourg, 10 May 1979	Signatures: U.K., Belgium, France, German F.R., Luxembourg and Switzerland 10 May 1979; Denmark 20 June 1979; Sweden 28 November 1979	Text: Miscellaneous, No. 2 (1980) (Cmnd. 7776)
I.L.O. Convention concerning the Protection of Workers against Occupational Hazards in the Working Environment due to Air Pollution, Noise and Vibration (I.L.O. No. 148). Entered into force 11 July 1979	Geneva, 20 June 1977	Signature not required. U.K. ratification (Air Pollution only) 8 March 1979, effective date 8 March 1980. Extension to Guernsey registered with I.L.O. 4 June 1979. Also ratified by Ecuador, Finland, Norway and Sweden	40 (1980) (Cmnd. 7901)
Treaty between the Member States of the European Communities and the Hellenic Republic concerning the accession of the Hellenic Republic to the European Economic Community and the European Atomic Energy Community (Not in force)	Athens, 28 May 1979	Signatories: Nine Member States of the European Communities and Greece 28 May 1979	Text: European Communities, No. 18 (1979) (Cmnd. 7650)
Convention on the Conservation of European Wildlife and Natural Habitats (Council of Europe No. 104) (Not in force)	Berne, 19 September 1979	Signatories: U.K., eighteen other European States and the E.E.C. 19 September 1979	Text: Miscellaneous, No. 3 (1980) (Cmnd. 7809)
Constitution of the United Nations Development Organization (Not in force)	Vienna, 8 April to 7 October 1979 and subsequently at New York (U.N.)	Signatories: U.K. 5 October 1979. Numerous other States have also signed	Text: Miscellaneous, No. 7 (1980) (Cmnd. 7861)
Agreement on Co-operation in Astrophysics (Not in force)	La Palma, 26 May 1979	Signatories: U.K., Denmark, Spain and Sweden 26 May 1979	Text: Miscellaneous, No. 6 (1980) (Cmnd. 7834)
Convention on Long-Range Transboundary Air Pollution (Not in force)	Geneva (U.N.), 13 to 16 November 1979	Signatories: U.K. 13 November 1979	Text: Miscellaneous, No. 10 (1980) (Cmnd. 7885)

Text: Miscellaneous, No. 5 (1980)
(Cmnd. 7823)

Signatories: The Nine Member
States of the European Com-
munities 4 December 1979

Dublin,
4 December 1979

Agreement concerning the Application of
the European Convention on the Sup-
pression of Terrorism among the Mem-
ber States of the European Com-
munities
(Not in force)

II. BILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1979¹

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Treaty Series</i>
AUSTRALIA			
Agreement concerning Nuclear Transfers between the United Kingdom and Australia	London, 24 July 1979	Entered into force on signature	6 (1980) (Cmnd. 7768)
BANGLADESH			
Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	Dacca, 8 August 1979	Not yet in force	Text: Bangladesh, No. 1 (1979) (Cmnd. 7741)
Exchange of Notes constituting the United Kingdom/Bangladesh Debt Agreement No. 1, 1979	Dacca, 20 September 1979	Entered into force on signature	19 (1980) (Cmnd. 7816)
BRAZIL			
Exchange of Notes further amending the Air Services Agreement of 31 October 1946	Brazilia, 12 and 21 September 1979	Entered into force 21 September 1979	26 (1980) (Cmnd. 7831)
BRUNEI			
Treaty of Friendship and Co-operation	Brunei, 7 January 1979	Not yet in force	Text: Miscellaneous, No. 5 (1979) (Cmnd. 7496)
Exchange of Notes terminating the Special Treaty Relations	Brunei, 7 January 1979	Not yet in force	Text: Miscellaneous No. 5 (1979) (Cmnd. 7496)

¹ Table supplied by the Foreign and Commonwealth Office.

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Treaty Series</i>
CANADA Exchange of Notes amending and extending the Agreement of 7 December 1971 concerning the Training of United Kingdom Armed Forces in Canada (Suffield Agreement)	Ottawa, 26 November 1979	Entered into force on signature	39 (1980) (Cmnd. 7894)
CHINA, PEOPLE'S REPUBLIC OF Agreement relating to Civil Air Transport	London, 1 November 1979	Entered into force on signature	14 (1980) (Cmnd. 7798)
Agreement on Co-operation in the Fields of Education and Culture	London, 1 November 1979	Entered into force 12 May 1980	Text: China, No. 1 (1980) (Cmnd. 7835)
COLOMBIA Cultural Convention	London, 3 July 1979	Entered into force 23 May 1980	Text: Colombia, No. 1 (1979) (Cmnd. 7693)
DENMARK Agreement relating to Air Services	Oslo, 26 January 1979	Entered into force on signature	62 (1979) (Cmnd. 7608)
Exchange of Notes amending Article XII of the Treaty for the Mutual Surrender of Fugitive Criminals signed at Copenhagen on 31 March 1873, as amended	Copenhagen, 24 August 1979	Entered into force on signature	106 (1979) (Cmnd. 7753)
DOMINICAN REPUBLIC Exchange of Notes concerning the Exchange of Official Publications	London, 2 October 1979	Entered into force on signature	10 (1980) (Cmnd. 7782)
ECUADOR Cultural Convention	Quito, 18 June 1979	Not yet in force	Text: Ecuador, No. 1 (1979) (Cmnd. 7694)
EGYPT Exchange of Notes regarding the Use of British Capital Untransferable Accounts in Egypt	Cairo, 22 May 1979	Entered into force on signature	85 (1979) (Cmnd. 7702)

FINLAND

Protocol amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital signed at London on 17 July 1969, as modified by the Protocol signed at London on 17 May 1973

Not yet in force

Not yet published

FRANCE

Exchange of Notes regulating Social Security Arrangements between France and Jersey under the Convention on Social Security of 10 July 1956

Exchange of Notes amending the Schedule to the Exchange of Notes of 15 September 1977 concerning the establishment of a Representative Assembly for the New Hebrides

Entered into force 14 May 1980

Not yet published

8 (1980) (Cmnd. 7777)

Exchange of Notes concerning Independence for the New Hebrides

Entered into force on signature

17 (1980) (Cmnd. 7808)

Exchange of Notes concerning the Establishment of Regions in the New Hebrides

Entered into force on signature

20 (1980) (Cmnd. 7817)

GREECE

Exchange of Notes concerning the Loan of Nuclear Fuel to Athens University

Exchange of Notes extending to Bermuda the provisions of the Treaty of Commerce and Navigation signed at London on 16 July 1926

Entered into force on signature

25 (1980) (Cmnd. 7829)

Entered into force 24 August 1979

109 (1979) (Cmnd. 7789)

INDONESIA

Exchange of Notes constituting the United Kingdom/Indonesia Retrospective Terms Agreement, 1979

Entered into force on signature

102 (1979) (Cmnd. 7738)

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Treaty Series</i>
INDONESIA (<i>cont.</i>): Exchange of Notes replacing the Route Schedule to the Air Services Agreement of 28 June 1973	London, 14 November 1979	Entered into force on signature	28 (1980) (Cmnd. 7833)
ITALY Exchange of Notes bringing into force Article 29 (2) of the Consular Convention signed at Rome on 1 June 1954	Rome, 19 March and 21 April 1979	Entered into force 21 May 1979	79 (1979) (Cmnd. 7708)
JORDAN Exchange of Notes concerning the United Kingdom/Jordan Loan 1979	Amman, 14 March 1979	Entered into force on signature	65 (1979) (Cmnd. 7612)
Exchange of Notes amending the United Kingdom/Jordan Development Loan 1973/1976	Amman, 17 and 21 April 1979	Entered into force 21 April 1979	77 (1979) (Cmnd. 7682)
Agreement for the Promotion and Protec- tion of Investments	Amman, 10 October 1979	Entered into force 24 April 1980	52 (1980) (Cmnd. 7945)
KENYA Agreement for Air Services between and beyond their respective Territories	Nairobi, 5 July 1979	Entered into force on signature	88 (1979) (Cmnd. 7710)
MONACO Agreement concerning the Mutual Recog- nition of Tonnage Certificates	Monaco, 5 January 1979	Entered into force 6 March 1979	41 (1979) (Cmnd. 7536)
NETHERLANDS Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Estates of Deceased Persons and Inheri- tances and on Gifts	The Hague, 11 December 1979	Entered into force 16 June 1980	Text: Netherlands, No. 1 (1980) (Cmnd. 7860)
NORWAY Agreement relating to Air Services	Oslo, 26 January 1979	Entered into force on signature	63 (1979) (Cmnd. 7609)

Agreement relating to the Exploitation of the Statfjord Field Reservoirs and the Offtake of Petroleum therefrom	Oslo, 16 October 1979	Not yet in force	Text: Norway, No. 1 (1980) (Cmnd. 7813)
Agreement relating to the Exploitation of the Murchison Field Reservoir and the Offtake of Petroleum therefrom	Oslo, 16 October 1979	Not yet in force	Text: Norway, No. 2 (1980) (Cmnd. 7814)
Protocol further amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed at London on 22 January 1969 (relating to Trans-Median Line Oil and Gas Fields)	Oslo, 16 October 1979	Not yet in force	Text: Norway, No. 3 (1980) (Cmnd. 7848)
Similar amending Protocol to the above relating to the Statfjord Field Reservoirs	Oslo, 16 October 1979	Not yet in force	Text: Norway, No. 4 (1980) (Cmnd. 7849)
PAKISTAN Exchange of Notes constituting the United Kingdom/Pakistan Retrospective Terms Agreement	Islamabad, 26 June 1979	Entered into force on signature	101 (1979) (Cmnd. 7734)
PERU Agreement on Certain Commercial Debts	London, 12 December 1979	Entered into force on signature	37 (1980) (Cmnd. 7881)
SENEGAL Exchange of Notes constituting the United Kingdom/Senegal Loan 1979	Dakar, 6 April 1979	Entered into force on signature	16 (1980) (Cmnd. 7806)
SOVIET UNION Agreement on Relations in the Scientific, Educational and Cultural Fields for 1979-81	London, 1 March 1979	Entered into force 1 April 1979	69 (1979) (Cmnd. 7645)
Exchange of Notes concerning the Abolition of Visas for members of British Airways and Aeroflot	Moscow, 30 March 1979	Entered into force on signature	2 (1980) (Cmnd. 7764)

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Treaty Series</i>
SPAIN Exchange of Notes concerning the Exemption from Customs Duties of Material imported by Cultural Institutes in the United Kingdom and Spain	Madrid, 11 July 1979	Entered into force on signature	103 (1979) (Cmnd. 7739)
SRI LANKA Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	London, 21 June 1979	Not yet in force	Not yet published
SWEDEN Agreement relating to Air Services	Oslo, 26 January 1979	Entered into force on signature	64 (1979) (Cmnd. 7610)
Exchange of Notes amending Article 18 of the Extradition Treaty of 26 April 1963 as amended by the Protocol of 6 December 1965	Stockholm, 19 April 1979	Entered into force 19 July 1979	Not yet published
Protocol amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed at London on 28 July 1960	Stockholm, 6 June 1979	Not yet in force	Text: Sweden, No. 1 (1980) (Cmnd. 7868)
SWITZERLAND Exchange of Notes extending to Liechtenstein the Agreement on the International Carriage of Goods by Road signed at London on 20 December 1974	Berne, 5 February and 10 July 1979	Entered into force 10 July 1979	4 (1980) (Cmnd. 7766)
Exchange of Notes further revising the Route Schedules annexed to the Air Services Agreement signed at London on 5 April 1950	Berne, 16 January and 5 February 1979	Entered into force 5 February 1979	50 (1979) (Cmnd. 7552)

THAILAND	Exchange of Notes further amending the Route Schedule annexed to the Air Services Agreement signed at Bangkok on 10 November 1950	Bangkok, 28 June 1979	Entered into force on signature	75 (1979) (Cmnd. 7674)
TONGA	Convention providing for the Reciprocal Enforcement of Judgments in Civil Matters	London, 28 June 1979	Not yet in force	Text: Tonga, No. 1 (1979) (Cmnd. 7716)
TURKEY	Exchange of Notes concerning the Termination of the Central Treaty Organization signed at Baghdad on 24 February 1955 and the Agreement on the Status of the Central Treaty Organization National Representatives and International Staff signed at Ankara on 9 November 1960 Exchange of Notes constituting the United Kingdom/Turkey Loan Agreement 1979	Ankara, 2 and 4 October 1979	Entry into force CENTO—30 April 1979 Status Agreement—26 September 1979	Not yet published
		Ankara, 21 September 1979	Entered into force on signature	24 (1980) (Cmnd. 7827)
UNITED NATIONS	Exchange of Notes with the World Health Organization concerning Exemption of W.H.O. Officials from Social Security Contributions	Geneva, 30 March 1979	Not yet in force	Text: Miscellaneous, No. 15 (1979) (Cmnd. 7591)
UNITED STATES	Exchange of Notes relating to the Import into the United States of Meat from Belize Third Protocol further amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains signed at London on 31 December 1975	Washington, 11 and 30 January 1979 London, 15 March 1979	Entered into force 30 January 1979 Entered into force 25 April 1980	52 (1979) (Cmnd. 7562) Text: United States, No. 3 (1979) (Cmnd. 7611)

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Treaty Series</i>
UNITED STATES (<i>cont.</i>):			
Reciprocal Fisheries Agreement [Virgin Islands]	London, 27 March 1979	Not yet in force	Text: United States, No. 2 (1979) (Cmnd. 7602)
Exchange of Notes concerning the use of the Louisiana Offshore Oil Port (LOOP) by Vessels registered in the United Kingdom, the West Indies Associated States or its other Territories or flying the flag of the United Kingdom	Washington, 14 and 25 May 1979	Entered into force 25 May 1979	86 (1979) (Cmnd. 7703)
Exchange of Notes further amending the Agreement of 15 February 1960 on the setting up of a Ballistic Missile Early Warning System in the United Kingdom	London, 18 June 1979	Entered into force on signature	91 (1979) (Cmnd. 7719)
Amendment to the Agreement for Co-operation in the Uses of Atomic Energy for Defence Purposes	Washington, 5 December 1979	Entered into force 25 March 1980	Not yet published
MISCELLANEOUS			
Exchange of Notes with the International Lead and Zinc Study Group concerning Group Staff Social Security Arrangements	London, 9 March 1979	Not yet in force	Text: Miscellaneous No. 14 (1979) (Cmnd. 7592)
Headquarters Agreement with the International Oil Pollution Compensation Fund	London, 27 July 1979	Entered into force on signature	80 (1979) (Cmnd. 7692)
Agreement relating to the Commissions established by the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft 1972 and the Convention for the Prevention of Marine Pollution from Land Based Sources [Oslo and Paris Commissions]	London, 27 July 1979	Entered into force on signature	Not yet published

III. UNITED KINGDOM LEGISLATION DURING 1979
CONCERNING MATTERS OF INTERNATIONAL LAW¹

The Carriage by Air and Road Act (1979 c. 28) enables effect to be given to Protocols Numbers 3 and 4 of 25 September 1975 amending the Warsaw Convention on International Carriage by Air of 1929 as amended at The Hague in 1955, and amends certain Acts concerning carriage by air or road in consequence of the revision of conventions on those matters.

The European Communities (Greek Accession) Act (1979 c. 57) extends the meaning in Acts, Measures and subordinate legislation of 'the Treaties' and 'the Community Treaties' in connection with the accession of Greece to the European Communities.

The International Monetary Fund Act (1979 c. 29) consolidates the enactments relating to the International Monetary Fund and repeals, as obsolete, the European Monetary Agreement Act 1959.

The Kiribati Act (1979 c. 27) makes provision for, and in connection with, the attainment by the Gilbert Islands of fully responsible status as a Republic within the Commonwealth under the name of Kiribati.

The Merchant Shipping Act (1979 c. 39) amends the law relating to pilotage, carriage by sea, liability of shipowners and salvors, pollution and seamen. It enables the United Kingdom to ratify the Athens Convention relating to Carriage of Passengers and Their Luggage by Sea 1974, the London Convention on Limitation of Liability for Maritime Claims 1976, I.L.O. Convention Number 147 on the Standards of Training Certification and Watchkeeping of Seafarers 1978 and various conventions and protocols concerning pollution. It permits effect to be given by Order in Council to agreements on pollution which have been ratified by the United Kingdom notwithstanding the fact that such agreements have not come into force internationally.

The Southern Rhodesia Act (1979 c. 52) provides for the grant of a constitution for Zimbabwe to come into effect on the attainment by Southern Rhodesia (under the subsequent Zimbabwe Act 1979) of fully responsible status as a Republic under the name of Zimbabwe, and makes other provision with respect to Southern Rhodesia.

The Zimbabwe Act (1979 c. 60) makes provision for, and in connection with, the attainment by Southern Rhodesia of fully responsible status as a Republic under the name of Zimbabwe.

¹ Compiled by C. A. Hopkins.

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